

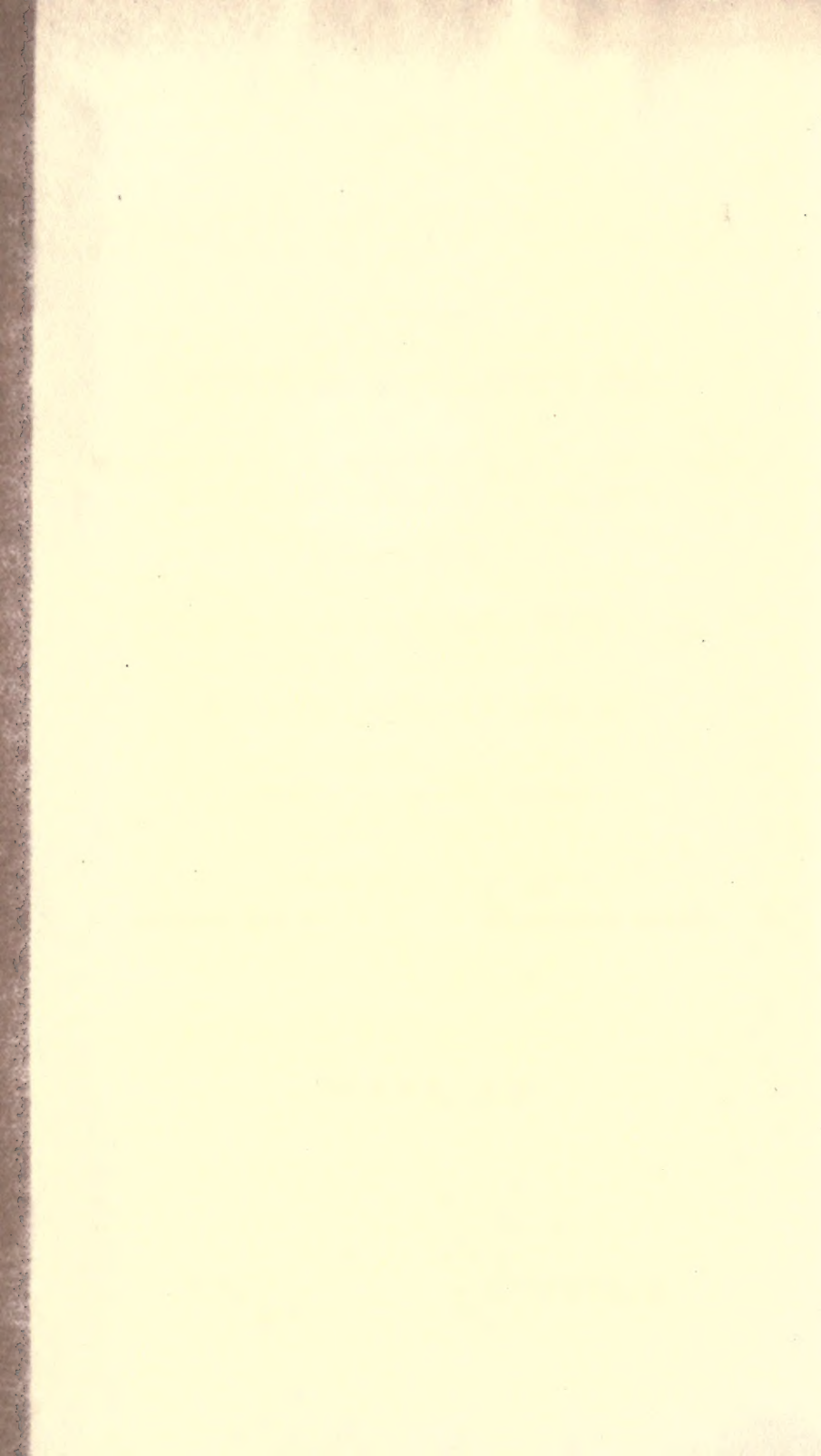
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DECIDED IN THE

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OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. XXXIX.

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VOL. XXXIX.

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CASES
IN THE
SUPREME COURT
OF
ALABAMA.

HODGE v. STATE.

[96 ALABAMA, 10.]

EVIDENCE THAT A DOG TRAINED TO FOLLOW THE TRACKS OF A HUMAN BEING was, within a very short time after a homicide, put upon the tracks of a person to whom circumstances pointed as the guilty actor, and that the dog, as if following those tracks, went to the house of the defendant, where he is shown to have been that night after the killing, is competent to go to the jury with other testimony as a circumstance tending to connect him with the crime.

INDICTMENT and conviction of the defendant for the murder of Rose Stanback. The evidence tended to prove, among other facts, that, immediately after the killing of the deceased, persons went to her house, and, from holes left by a shot in the doorsteps, determined the direction whence the fatal shot had been fired; that going in such direction they found the tracks of a human being; that they put upon those tracks a dog trained to follow human tracks, and that this dog followed the tracks to the house of the defendant. There was also evidence as to the size and character of the tracks, and their similarity to tracks known to have been made by the defendant. The testimony respecting the trailing by the dog was objected to, and the ruling of the court admitting it was excepted to.

William L. Martin, attorney general, for the state.

No brief for the appellant.

11 McCLELLAN, J. It is common knowledge that dogs may be trained to follow the tracks of a human being with

considerable certainty and accuracy. The evidence in this case showed that a dog thus trained was, within a very short time after the homicide, put upon the tracks of a person toward whom all the circumstances strongly pointed as the guilty agent, and that the dog, as if following these tracks or "trailing," went to the house of the defendant. It was also in evidence, by several witnesses, that the tracks found at the scene of the homicide were followed by them thence to the house of the defendant, being measured at various points along the route, and otherwise, at each of such points, identified as being made by the same shoes as were the tracks at the place of the murder; and that the route thus traced by them was precisely that taken by the dog throughout. On this state of case, we are of the opinion that the fact that the dog, trained to track men, as shown in the testimony, was put on the tracks at the scene of the homicide, and, "taking the trail," so to speak, went thence to defendant's house, where he, the defendant, is shown to have been that night, after the killing, was competent to go to the jury for consideration by them, in connection with all the other evidence, as a circumstance tending to connect the defendant with the crime; and, of consequence, that the court committed no error in refusing to exclude it.

The ruling of the court on this point is the subject matter of the only exception reserved. This being without merit, the judgment must be affirmed; and, as affirmed, the sheriff of Escambia county will execute the sentence of death imposed thereunder as prescribed by law, on Friday, July 7, 1893.

Affirmed.

CRIMINAL LAW—CIRCUMSTANTIAL EVIDENCE.—Circumstantial evidence should be so strong as to tend to convince the jury of the defendant's guilt, and to exclude every supposition inconsistent therewith to warrant a conviction in a criminal case: *Sumner v. State*, 5 Blackf. 579; 36 Am. Dec. 561, and note; *Commonwealth v. Webster*, 5 Cush. 295; 52 Am. Dec. 711, and extended note; *People v. Aikin*, 66 Mich. 460; 11 Am. St. Rep. 512. To convict on circumstantial evidence, the circumstances must all concur to show that the accused committed the crime, and be inconsistent with any other rational conclusion: *Horne v. State*, 1 Kan. 42; 81 Am. Dec. 499, and note. See the extended note to *Rippey v. Miller*, 62 Am. Dec. 179, where this subject is further discussed.

SANDERS v. McMILLIAN.

[98 ALABAMA, 144.]

DOWER MUST BE SET OUT BY METES AND BOUNDS WHENEVER the property is capable of division.

DOWER.—AN ASSIGNMENT OF DOWER BY METES AND BOUNDS MAY BE DISPENSED WITH when, from the nature of the husband's interest or from the quality of the thing itself, an assignment in that manner is impracticable. An assignment of compensation in lieu of dower may then be made, and such assignment should be so made as to yield to the widow one-third of the rents and profits of the entire estate.

DOWER.—IN ASSIGNING DOWER THE VALUE OF THE LAND was by the common law estimated at the time of the assignment, and the widow thus shared the benefits of improvements made, as well as of other enhancements of the value, and was required to suffer loss resulting from unavoidable diminution in the value of the lands intervening between the death of her husband and the assignment of her dower. If the deterioration was due to the wrongful act of the heir, she was entitled to an action for damages, but it did not alter the manner of the assignment of her dower.

DOWER.—IN ASSIGNING DOWER TO A WIDOW IN LANDS ALIENATED BY HER HUSBAND she must be endowed according to the value of the estate at the time of his death regardless of any diminution or advancement resulting from the acts of the purchaser or otherwise, except that in Alabama she is not entitled to the advantage of improvements made by him. The dower will be assigned by metes and bounds instead of awarding the widow a compensation in money, though it appears that the lands, having been conveyed by her husband in his lifetime, subsequently diminished in value from the negligence of the purchaser in not keeping the property in good repair and in not renewing the soil by proper fertilizers.

DOWER.—IF WASTE IS COMMITTED BY THE ALIENEE OF THE PROPERTY IN THE HUSBAND'S LIFETIME the widow has no remedy; it is otherwise for waste committed after the husband's death.

BILL by Eliza A. Sanders, widow of Charles P. Sanders, deceased, for an assignment of dower in certain real property which had been conveyed by her husband in 1861, and after his marriage to the complainant. The purchaser from the husband had taken and retained possession of the property, and the complainant alleged that it would be unjust to assign her dower by metes and bounds because of the diminution in value after the conveyance by the husband had been made, and while the real estate was in the possession of his alienees. A demurrer was interposed on the ground that the bill did not show sufficient reason why dower could not be assigned by metes and bounds. The defendant also moved to strike out from the bill the paragraph relating to the value of the lands at the time of the alienation and the depreciation

in value since that time. The motion to expunge was sustained, and the widow held entitled to an assignment of dower by metes and bounds and not otherwise, and thereupon she appealed.

Greene B. Mobley, for the appellant.

Ed De Graffenried, for the appellee.

145 THORINGTON, J. Appellant filed her bill in the chancery court for the assignment of dower in lands of which her husband was seised in fee in his lifetime, but which were alienated by him to appellee's vendor without appellant's joining in the conveyance, or otherwise relinquishing her dower interest since such conveyance. The bill alleges 146 that an assignment of dower by metes and bounds would be unjust, and claims that appellant is dowable of the value of the land at the time of the alienation, and that the interest on one-third part of such valuation from the death of her husband shall be paid to her annually during her life and secured by a lien on the land.

The reasons alleged to show that an assignment of dower in the lands by metes and bounds would be unjust are, that the tract of land at the time of its alienation was worth about fourteen thousand dollars, and that its value at the time of the death of appellant's husband was one thousand dollars, that the depreciation in value was caused "largely by the wear and tear of time, and the unskillful cultivation of the soil, coupled with the want of fertilizers, and the failure to keep the houses in repair, all these coupled with the fact that there is a general decline in values in real estate in that locality," and it is further alleged "that if said tract of land had been kept up to the standard of a well-regulated farm, and the buildings kept in good repair, then the depreciation in value would not be so great."

The land was aliened by the husband in the year 1861, and the death of the husband occurred in the year 1889.

The general rule is, that whenever the property in which the widow is entitled to dower is capable of division, dower must be set off by metes and bounds: 5 Am. & Eng. Ency of Law, 927; 2 Scribner on Dower, sec. 1, p. 581; *McClanahan v. Porter*, 10 Mo. 746; *Dunseth v. Bank United States*, 6 Ohio 76; Code 1886, secs. 1901, 1910.

The assignment of dower by the common law is of one-third part of the lands and tenements of which the widow

is dowable, to be set out by metes and bounds, where it is practicable, to be held by her for life. The endowment is required to be of parcel of the lands and tenements themselves. Dower so assigned is said to have been set out "according to common right."

When, however, the property did not admit of an assignment of dower in severalty, either from the nature of the husband's interests in it, or from the quality of the thing itself, the assignment by metes and bounds was of necessity dispensed with, and an assignment of compensation in lieu of dower was made, or an assignment "against common right," as it is sometimes designated, and this assignment was so made as to yield the widow one-third of the rents and profits received from the entire estate.

It was further the rule of the common law that if the land was held by the heir or devisee the widow was entitled to ¹⁴⁷ have the value of the land estimated at the time dower was assigned, thus giving her the benefit of improvements made by the heir or devisee, and, also, that she would bear a proportion of the loss which may have been incurred by an unavoidable diminution in the value of the lands during the time which intervenes between the death of her husband and the assignment of her dower. If such deterioration was caused by the willful waste of the heir she was entitled to an action for damages against him, but it did not affect or alter the manner of assignment: Tiedeman on Real Property, sec. 135.

With regard to the assignment of dower in alienated estates the rule in England, as declared in *Doe ex dem. Riddell v. Gwinnell*, 1 Q. B. 682, is that the widow shall be endowed according to the value of the estate at the death of the husband, regardless of any improvement or deterioration resulting from the acts of the purchaser.

But in this country the rule in such cases, according to the weight of authority, is more favorable to the purchaser, and excludes the widow from taking advantage of his improvements upon the estate, but it allows her generally, though not in all the states, to have the benefit of any rise in value resulting from other causes, the policy of the rule being to avoid discouraging purchasers from making improvements: *Westcott v. Campbell*, 11 R. I. 378; 2 Scribner on Dower, 612-617; Tiedeman on Real Property, sec. 135.

And that is the rule adopted in this state, both by judicial

decisions and by the statute: *Barney v. Frowner*, 9 Ala. 901; *Beavers v. Smith*, 11 Ala. 20; *Springle v. Shields*, 17 Ala. 295; *Francis v. Garrard*, 18 Ala. 794; *Ware v. Owens*, 42 Ala. 212; 94 Am. Dec. 642; *Wood v. Morgan*, 56 Ala. 397; Code 1886, sec. 1910.

In this state, before the present statute, when a dilapidated mill upon the land was torn down by a purchaser from the husband, and a new and expensive structure erected in its stead, it was held that the widow of the grantor was not entitled to any share of the improvements, and that her dower could be estimated with reference to the nature of the premises at the time of the alienation; that the destruction of the old mill afforded a proper case of compensation to the widow by a court of equity instead of an assignment by metes and bounds: *Beavers v. Smith*, 11 Ala. 20.

We have not been able to discover any case, nor has any been cited by counsel, in which deterioration in value either from natural causes or from the mere negligence of the purchaser or alienee in keeping the property in repair has been considered sufficient cause for assigning compensation in ¹⁴⁸ lieu of dower, instead of setting the same off by metes and bounds, or in which it is held that the widow is entitled to compensation on account of said deterioration. On the contrary the doctrine of permissive waste seems never to have been introduced into the common-law jurisprudence of this country to that extent. It is said by Chancellor Kent that, "Whether the land be improved in value, or be impaired by acts of the party subsequently, the endowment, in every event of that kind, is to be according to the value at the time of the assignment, if the land descended to the heir." And again: "The widow takes the risk of the deterioration of the estate arising from public misfortunes, or the acts of the party."

The foregoing quotations are contained in an elaborate and learned opinion of the supreme court of Missouri in the case of *McClanahan v. Porter*, 10 Mo. 746, in which the conclusion is reached that the widow takes her dower according to the value of the land at the time of the assignment, and that although she gains nothing by the improvements of the heir or alienee she suffers loss by his waste or neglect depreciating the value of the property. And in 2 Scribner on Dower, page 635, it is said: "In the United States the doctrine laid down by Perkins, that the widow has no remedy

for waste committed by the alienee during the lifetime of the husband seems to be generally acquiesced in. But for waste committed after the husband's death she has her remedy: 5 Am. & Eng. Ency. of Law, 931.

In this state when the dower is incapable of being set off by metes and bounds, or when it would be unjust from improvements made by the alienee, or from any other cause, to assign the dower by that mode, the chancery court alone has jurisdiction to make an assignment of compensation in lieu of dower.

And in such case the rule is fixed by statute that the widow is dowable of the value of the land at the time of alienation, the interest on one-third part thereof from the death of the husband to be paid her annually, during her life, and secured, if necessary, by a lien on the land, unless the parties agree to a compensation in gross to which the court must give effect: Code 1886, secs. 1910, 1911.

The test, however, whether an assignment by metes and bounds would, or not, be unjust, within the meaning of the statute, is not whether the interests of the dowress alone would be promoted or prejudiced by that mode of assignment. The rule prescribed by the statute "to be equal and just must be mutual."

¹⁴⁹ The mutual rights of the demandant and of the alienee must be considered, and the conclusion must be influenced, not by what would be the interest of the one or the other, but just and right, as between the two.

We do not think the facts alleged in the bill of complaint, in this case, make out a case within the contemplation of the statute, and entitling the demandant to an assignment of compensation in lieu of dower instead of by metes and bounds.

It is shown by the averments of the bill that the depreciation in the value of the land since the alienation is due largely to natural causes, and to a much less extent to the mere failure of the alienee to keep the property in repair from 1861, the time of the alienation, to 1891, the time of the demand for dower, and not from any willful waste on his part.

By the common law, as we have shown, while the widow shared in improvements made by the heir or devisee, neither the improvements made by an alienee of the husband, nor depreciation in value caused by his acts, or from natural causes, affected the rule for the assignment of dower, though

willful waste by either the heir, devisee, or alienee, after the husband's death, would afford the basis for a claim for damages, to be allowed not, it has been declared, as of any fixed period, but as of the value of the property at the different periods at which the widow is deprived of her dower. In the case of the heir—from the death of the husband; in the case of an alienee—from the time of the demand for dower until the assignment: *McClanahan v. Porter*, 10 Mo. 746; *Steele v. Brown*, 70 Ala. 235.

We discover nothing in our statute designed to change this general rule; on the contrary, this court, in *Wood v. Morgan*, 56 Ala. 397, speaking of a statute in substance the same as this, said: "So that the section of the code we are considering is rather a legislative recognition of an existing rule than the enactment of a new one."

Our statute, therefore, being in harmony with the common law, instead of making a change therein, it follows that mere depreciation of value, whether from natural causes or the act or omission of the alienee, presents no good reason for making an assignment of dower against the common right instead of according to the common right, or by metes and bounds.

Furthermore, recurring to the question whether it would be unjust, within the meaning of the statute, to the demandant to set off her dower by metes and bounds, we will add ¹⁵⁰ that the law would not have cast upon her husband, had he lived, until this time, any duty or obligation towards her, as respects her inchoate right of dower, to keep the premises in good repair, or to cultivate the lands "according to the standard of a well-regulated farm"; and if no such duty rested on the husband, we can conceive of no principle of law that would impose that obligation upon the alienee of the husband any more than upon the latter himself.

To assign dower, as the bill in this case seeks to have it done, would require a valuation of the land which would make the widow's third some four or five times greater than the present value of the entire tract.

Thus the alienee would be compelled to pay annual interest for the life of the dowress on a sum four or five times greater than the present value of the whole tract of land, and more than thirteen times greater than her one-third of the present value of the land. This would be the grossest injustice to the alienee.

An assignment of dower by metes and bounds, so far as any thing in the bill shows to the contrary, would operate justly to both parties.

There is no question of willful waste, committed after the death of the husband, presented by the bill, and consequently it is unnecessary to consider what the rights of the demandant would be in that case, or what the remedy for their enforcement.

We discover no error in the decree of the chancery court on the motions and demurrers filed by the appellee, and it is accordingly affirmed.

Affirmed.

Assignment of Dower.

While there are statutes purporting to confer upon a husband a right of dower in the estate of his wife (*Heisen v. Heisen*, 145 Ill. 658), and other statutes and decisions in which the right of a widow in personal property owned by her husband at the time of his death is spoken of as a right of dower (*McLaughlin v. McLaughlin*, 16 Mo. 242; *Price v. Price*, 6 Dana, 107; *McDougald v. Hepburn*, 5 Fla. 568; *Hewitt v. Cox*, 55 Ark. 225), yet we shall in this note employ the word "dower" in its ordinary common-law signification, which, as expressed by Bouvier in his Law Dictionary, is "an estate for life which the law gives the widow in the third part of the lands and tenements or hereditaments of which the husband was solely seised at any time, during the coverture, of an estate in fee or in tail, in possession, and to which estate in the lands and tenements the issue, if any, of such widow might, by possibility, have inherited." It will be seen that this definition entirely excludes interests in personal property: *Dow v. Dow*, 36 Me. 211. It also appears to exclude all lands not held in severalty. In this respect it is erroneous. As to lands held in joint tenancy there could be no right of dower, because the whole property on the death of a joint tenant vested in the survivor, or survivors; but on the enactment of a statute destroying the right of survivorship the moiety of each of the joint tenants becomes subject to his wife's right of dower: Freeman on Cotenancy and Partition, secs. 14, 39. Lands held by a tenancy in common were always subject to dower, though the inchoate right of a wife of one of the cotenants could not impair the power to make or compel a partition: Freeman on Cotenancy and Partition, sec. 107; *Maybury v. Brien*, 15 Pet. 21.

To Whom the Assignment May Be Made.—While at the common law the right of dower could be relinquished, it could not, in the proper sense of the term, be assigned. Therefore, while the widow might convey to the holder of the estate subject to the dower, her interest therein as doweress, and thus vest him with an estate in fee, it was not possible for her to transfer her interest to another person, and entitle such transferee to have an assignment of dower made to him and in his favor. Therefore, according to the weight of authority, the only person who can make an application for an assignment of dower is the widow herself: *Hart v. Burch*, 130 Ill. 426; *Heisen v. Heisen*, 145 Ill. 658; *Miller v. Pence*, 132 Ill. 151; *Jackson v. Van Derheyden*, 17 John. 167; 8 Am. Dec. 378; *Jones v. Fleming*, 37 Hun, 227; *Wilkinson v.*

Brandon, 92 Ala. 530; *Parton v. Allison*, 109 N. C. 674. In some parts of the United States, however, it has been held that the right of dower is equitably assignable, and that, under statutory provisions authorizing the assignment of choses in action, an equitable assignee of the widow's right to dower is invested with the right in his own name to bring an action to compel an assignment of dower for his own benefit: *Strong v. Clem*, 12 Ind. 37; 74 Am. Dec. 200; *Pope v. Mead*, 99 N. Y. 201; *Payne v. Becker*, 87 N. Y. 153. It would seem to follow as an inevitable consequence of the rule that an estate in dower is for life only; that no proceeding could be maintained for its assignment after the death of the widow entitled thereto. In some parts of the United States the estate has been changed by statute to one in fee, and it is a necessary result of this change that if the widow does not procure an assignment in her lifetime her heirs must be permitted, after her death, to prosecute the proceeding requisite to an assignment, for, if such were not the case, her estate in fee would be converted into an estate for life only by her mere inaction: *Woodberry v. Matherson*, 19 Fla. 778; *Potter v. Worley*, 57 Iowa, 66. After a demand for an assignment of dower has been made, there are decisions holding that the widow becomes equitably entitled to share the mesne profits of the whole estate, and that her right thereto is not necessarily terminated by her death, and that her heirs may successfully prosecute proceedings after her death for the purpose of enforcing her right to her moiety of such profits accruing after the demand for dower was made, and prior to her death: *Paul v. Paul*, 36 Pa. St. 270. So it has been held that after an action or other proceeding is brought for the assignment of dower and the recovery of rents and profits, the right to such recovery does not terminate upon the death of the widow, and that, notwithstanding such death, her personal representatives may recover such rents for the period intervening between the death and the commencement of the action: *Mayruder v. Smith*, 79 Ky. 512. Whether, by any proceeding at law or in equity, damages may be recovered by an heir or personal representative of the widow on account of mesne profits to which she was entitled after demanding assignment of dower, it is clear that such mesne profits, if recovered at all, can only be recovered from an heir, and never from an alienee of her husband: *Turney v. Smith*, 14 Ill. 242; *Johnson v. Thomas*, 2 Paige, 377.

As the dower interest of a wife or widow was not subject to assignment by her voluntary act, it cannot be subject to such assignment by compulsory proceedings against her. It is not liable to be levied upon nor sold under execution, nor can it, by proceedings in equity, be subjected to the payment of her debts by compelling her to execute an assignment of it, or otherwise: *Maxon v. Gray*, 14 R. I. 641; *Carnell v. Wilson*, 21 Ark. 62; 76 Am. Dec. 351; *Combs v. Young's Widow*, 4 Yerg. 218; 26 Am. Dec. 225; *Sutherland v. Sutherland*, 69 Ill. 481; *Pennington v. Yell*, 11 Ark. 212; 52 Am. Dec. 262; *Moore v. Mayor*, 8 N. Y. 110; 59 Am. Dec. 473; *Rausch v. Moore*, 48 Iowa, 611; 30 Am. Rep. 412. *Contra*: *Greathead's Appeal*, 42 Conn. 374; though, perhaps, in some of the states this rule has been modified in so far as to enable creditors to reach and subject her dower interest to execution for the payment of debts incurred by her after the death of her husband had vested her with the right to demand that the assignment of dower be made: *Boltz v. Stolz*, 41 Ohio St. 540.

As no one, other than the widow, is entitled to enforce an assignment of dower, in the absence of statutory provisions modifying the common law upon

the subject, so the fact that the applicant for the assignment is the widow of one who, during his marriage to her, was seized of an estate in the real property to which the issue of the marriage might have succeeded by inheritance, is sufficient to sustain her claim, unless she has relinquished it or divested herself of it in some mode prescribed by law, as by joining in a conveyance thereof with her husband, or otherwise relinquishing her rights to one who has acquired the husband's estate, either by conveyance, devise, or descent.

It is true that the wife's right to dower in her husband's real property is, during his lifetime, a mere expectancy, and not an estate in land, and that for some purposes, at least, she has no vested rights. Nevertheless, it is not true that her interest is one which the law will not protect. On the contrary, she has valuable right, favored by the courts, and for the protection of which, in proper cases, courts of equity will, at her instance, interpose: *Crosby v. Farmers' Bank*, 107 Mo. 436; *McDonald v. Aten*, 1 Ohio St. 293; *Kennedy v. Nedrow*, 1 Dall. 415, 417; *Chew v. Chew*, 1 Md. 163; *Tate v. Jay*, 31 Ark. 576.

The interest of a wife is not a vested interest in the sense that it is protected from impairment by the legislature. The state, acting through its legislative power, may enlarge or diminish the right of dower, or take it away altogether: *Goodkind v. Bartlett*, 136 Ill. 18; *Kusch v. Kusch*, 143 Ill. 353; *Heisen v. Heisen*, 145 Ill. 658; *Miller v. Pence*, 132 Ill. 151; *Simar v. Canady*, 53 N. Y. 39; 13 Am. Rep. 523; or may authorize proceedings in the exercise of the right of eminent domain, in which no notice need be taken of, and no compensation made for, her inchoate interest: *Moore v. Mayor of New York*, 8 N. Y. 110; 59 Am. Dec. 473; and statutes enlarging, diminishing, or destroying the right of dower apply to marriages already contracted and lands already acquired, and as against wives, who, but for the enactment of such statutes, would have been entitled to dower had they survived their husbands: *Barbour v. Barbour*, 46 Me. 9; *Lucas v. Sawyer*, 17 Iowa, 517; *Noel v. Ewing*, 9 Ind. 57; *Pratt v. Tefft*, 14 Mich. 191.

Unless the legislature interposes to destroy the right, neither the husband nor any one proceeding against him, or by his authority, can impair the wife's right of dower, and it is, therefore, no answer to a widow's demand for an assignment that her husband in his lifetime granted, or conveyed, or otherwise assumed to divest her of her interest therein, or that persons proceeding against him undertook to acquire title by execution sale or other compulsory proceedings to which she was not a party. Her interest is paramount to the claims of his creditors and to any sale which may be made under execution against him, unless the lien thereof antedated the marriage: *Combs v. Young's Widow*, 4 Yerg. 218; 26 Am. Dec. 225; *Sutherland v. Sutherland*, 69 Ill. 481; *House v. Towle*, 22 Or. 303; *Rutherford v. Read*, 6 Humph. 423; *Harrison v. Eldridge*, 7 N. J. L. 408; *Barker v. Barker*, 17 Mass. 564; note to *Den v. Frew*, 22 Am. Dec. 710; and even when the lien has its inception anterior to the marriage, it is said that a sale thereunder must be consummated in the lifetime of the husband, or the interest of the lienholder and of the purchaser will be subordinated to the rights of the wife to an assignment of her dower: *Simmons v. Latimer*, 37 Ga. 490; *Blodgett v. Brent*, 3 Cranch. C. C. 394; *Frost v. Ethridge*, 1 Dev. (N. C.) 30.

Of course, the wife's right to dower is subject to be defeated by any cause sufficient to defeat the estate of her husband, and she is obliged to submit to whatever he may be compelled to submit to; and this, though he submits

without compulsion, provided his submission could have been compelled, and he acts without fraud, and not in an attempt to defeat or impair her rights. Thus, if the land is not wholly his, but is held by him in cotenancy with others who have a right to compel him to make partition thereof, he may make such partition without compulsion, and thereby extinguish her right of dower in the portion assigned to his cotenants and restricted to the part assigned to him. In so doing he does not injure her if he acts fairly, and she must respect the partition, unless she can assail it for fraud upon her rights: Freeman on Cotenancy and Partition, sec. 411; *Lee v. Lindel*, 22 Mo. 203; 64 Am. Dec. 262; *Mosher v. Mosher*, 32 Me. 414. So, though the partition is brought about by compulsory proceedings, she is bound by these proceedings in the absence of fraud, though not a party thereto, and by them her inchoate right of dower is "removed from the whole tract and attached to the property assigned in severalty to her husband": Freeman on Cotenancy and Partition, sec. 432; *Coles v. Coles*, 15 Johns. 321; *Hinds v. Stevens*, 45 Mo. 209.

In the instances to which we have referred, it may well be said that the wife's right to dower has not been defeated or impaired, but simply attached to an estate in severalty instead of an estate in common. This cannot be said, however, of proceedings in partition resulting in a sale of the property of the cotenancy, the effect of which is to convert an estate in realty which is subject to dower into an estate in personalty which is not so subject. Doubtless, because it is within the legislative power to destroy an inchoate right of dower altogether, it may authorize its destruction by a sale of the property in partition. The more difficult question is whether, in the absence of any direct expression of the legislative will upon the subject, the mere authorization of sales in partition should be construed as authorizing such sales to be made without making wives of cotenants parties to the suit, and giving them an opportunity of showing that no necessity for the sale existed, or to have some provision made in their favor compensating them for the destruction of their rights involved in the sale. The better opinion, perhaps, is that if a sale is authorized by a statute which does not provide that wives of cotenants shall be made parties to the proceedings therefor, then the title acquired at such a sale is paramount to any claim which afterwards may be made for an assignment of dower on behalf of a widow whose interests had not become vested by the death of her husband before such sale was made: Freeman on Cotenancy and Partition, sec. 474; *Jackson v. Edwards*, 7 Paige, 391; 22 Wend. 512; *Warren v. Twilley*, 10 Md. 39; *Lee v. Lindell*, 22 Mo. 202; 64 Am. Dec. 262; *Weaver v. Gregg*, 6 Ohio St. 547; 67 Am. Dec. 355. *Contra: Greiner v. Klein*, 28 Mich. 12.

The instances already considered in which the widow's right to an assignment of dower may be wholly or partly defeated by some act occurring subsequently to the marriage, so far as defensible at all, rest upon the assumption that the husband has but yielded a right or entered into an agreement according to, and in the line of, his duty, and in respect to which he may fairly be regarded as acting as her representative, and as the protector of his interest as well as her own. A few other cases exist falling within this general reason. Thus, actions may be brought against him in which the title to property in his possession or claimed by him may be involved, and the result of which may be an adjudication against his claim of title or his right of possession; and such adjudication, when it constitutes an available estoppel against any further assertion of title on his part, is ordinarily equally avail-

able as against her, at least where he has made a defense, and has not permitted the controversy to be determined upon his default; but no collusive action or inaction on his part can defeat her rights: *Scribner on Dower*, 2d ed., 608-613.

It is essential to the claimant's right that she answer "the description of a lawful wife of the decedent," though for the purpose of proving herself to have been such a wife, it may not be necessary for her to show the solemnization of the marriage. The marriage may be inferred "from cohabitation, reputation, acknowledgment of the parties, reception in the family, and other circumstances": *Fenton v. Leed*, 4 Johns. 52; 4 Am. Dec. 244; *De France v. Johnson*, 26 Fed. Rep. 891. It is, of course, beyond the scope of this note to enter into an inquiry respecting what is a lawful marriage to the extent of entitling the woman to dower in the estate of her husband, or of one who has occupied to her the relation of husband. Though the marriage was duly solemnized, it cannot confer a right to dower if it was void in law: 1 *Scribner on Dower*, 114. If, on the other hand, the marriage is not void, but voidable at the instance of one of the parties, it will support a claim of dower unless actually avoided in the lifetime of both; but if it be so avoided, "the sentence annulling the marriage for such cause makes it void *ab initio*, and consequently defeats all claim of dower founded thereon": 1 *Scribner on Dower*, 2d ed., c. 8, p. 146. It is not, however, always essential to a claim of dower that the applicant should have remained until his death the wife of the man out of whose realty she seeks to have the assignment made. After a valid marriage a divorce may have been granted either by a special act of parliament or of some other competent legislative body, or by some court of competent jurisdiction, for some cause designated by statute as a ground for such divorce. While there is, perhaps, no adjudication necessarily determinative of the question, the course of proceeding in respect to parliamentary or legislative divorces has been in harmony with the assumption that the wife's right to dower is not destroyed thereby unless an intention to effect such destruction is apparent from the terms of the statute: *Scribner on Dower*, c. 19; *Lady Stowell's case*, Godb. 145. It was formerly the law in England that an absolute divorce could not be granted except for causes existing at the time of the marriage, and when granted for such a cause, it operated as an annulment of the marriage itself, and left the divorced wife without any possible right of dower. If a divorce is a *mensa et thoro* merely, as it does not entirely destroy the marriage, there can be no doubt that it does not destroy the wife's right to dower: *Day v. West*, 2 Edw. Ch. 592; *Burr v. Burr*, 10 Paige, 20. If, however, the divorce is a *vincula matrimonii*, its consequence in this respect is not so indisputable. The prevailing, and doubtless the better, opinion is that a divorce of this character, though granted for a cause occurring subsequently to the marriage, has the same effect as if granted for a pre-existing cause rendering the marriage voidable at the time it was contracted, and therefore that it leaves both the husband and the wife incapable of asserting any claim in the property of the other dependent on the marriage, and therefore destroys her right to dower: *Gleason v. Emerson*, 51 N. H. 405; *Calame v. Calame*, 24 N. J. Eq. 440; *Gould v. Crow*, 57 Mo. 200; *Whitsell v. Mills*, 6 Ind. 229; *Rice v. Lumley*, 10 Ohio St. 596; *Billan v. Hercklebrath*, 23 Ind. 71; *Burdick v. Briggs*, 11 Wis. 126; *Levins v. Sleator*, 2 G. Greene, 604; *McCraney v. McCraney*, 5 Iowa, 232; 68 Am. Dec. 702; *Reynolds v. Reynolds*, 24 Wend. 193; *Charrnaud v. Charrnaud*, 1 N. Y. Leg. Obs. 134; *Burr v. Burr*, 10 Paige, 20; *Jordan v. Clark*, 81 Ill.

465; *Wait v. Wait*, 4 Barb. 192; *Harding v. Alden*, 9 Me. 140; 23 Am. Dec. 549; *Boykin v. Rain*, 28 Ala. 332; 65 Am. Dec. 349; *Barrett v. Failing*, 111 U. S. 523. These decisions are specially inequitable when the divorce has been granted at the instance of a wife because of the misconduct of the husband, involving the most flagrant disregard of his marital obligations, and hence some of the courts have refused to follow them in this class of cases: *Wait v. Wait*, 4 N. Y. 95; and at the present time, generally, as the result of statutory provisions on the subject, an absolute divorce does not defeat a wife's right to dower in the previously acquired land of her husband where such divorce is not the result of any misconduct on her part: *Scribner on Dower*, c. 19.

A wife may also, by committing adultery under certain circumstances, forfeit her right to dower. This results from the statute 13 Edward I., chapter 34, substantially adopted in the greater portion of these United States, declaring that, if a wife elope and continue with an adulterer she shall be barred of her dower, unless her husband willingly reconcile her, and suffer her to dwell with him. Under these statutes it is not the mere act of adultery which forfeits the rights of the erring wife, but that act in connection with an elopement; but the courts seem to regard every adultery as connected with an elopement, and the conduct of the wife as a continuing with an adulterer, unless the crime takes place on the premises of the husband, or is followed by a reconciliation with him. It is not essential that she leave him with an adulterer, or with a view to committing adultery, or that she permanently, or openly, or for any specific length of time, reside with an adulterer, or continue adulterous practices: *Scribner on Dower*, c. 18; *Walters v. Jordan*, 13 Ired. 361; 57 Am. Dec. 558; *Bell v. Nealy*, 1 Bail. 312; 19 Am. Dec. 686; *Reel v. Elder*, 62 Pa. St. 316; 1 Am. Rep. 414.

It is further essential to the claimant's right to an assignment that her husband be dead. Upon his natural death, and not before, the right of dower becomes consummate, though even then it is not until dower is assigned that she becomes seised of any estate in the land, or possessed of any thing except a right resting in action, or rather in some appropriate proceeding, to have the dower assigned: *Shoot v. Galbreath*, 128 Ill. 215; *Riggs v. Girard*, 133 Ill. 620; *Hart v. Burch*, 130 Ill. 426; *Heisen v. Heisen*, 145 Ill. 658; *Pollitt v. Kerr*, 49 N. J. Eq. 65; *Witthaus v. Schack*, 105 N. Y. 332; *Jackson v. Van Derheyden*, 17 Johns. 167; 8 Am. Dec. 378; *Blodget v. Brent*, 3 Cranch C. C. 394; *Summers v. Babb*, 13 Ill. 483; *Moore v. New York*, 4 Sand. 456; *Strong v. Bragg*, 7 Blackf. 62; *Gooch v. Atkins*, 14 Mass. 378; *Cox v. Jagger*, 2 Cow. 638; 14 Am. Dec. 522; *Shields v. Batts*, 5 J. J. Marsh. 13; *Tompkins v. Fonda*, 4 Paige, 448; *Torrey v. Minor*, 1 Smedes & M. Ch. 489; *Central Park Extension*, 16 Abb. Pr. 56; *Harrison v. Wood*, 1 Dev. & B. Eq. 437; *Potter v. Everitt*, 7 Ired. Eq. 152; *Webb v. Boyle*, 63 N. C. 271; *Hozsie v. Ellis*, 4 R. I. 123; *Lamar v. Scott*, 4 Rich. 516; *Lawrence v. Miller*, 2 N. Y. 245; *Aikman v. Harsell*, 98 N. Y. 191; *Rayner v. Lee*, 20 Mich. 384; *Carnall v. Wilson*, 21 Ark. 62; 76 Am. Dec. 351. Some statutory innovations upon this rule have been introduced, entitling a wife in the absence of the death of her husband to maintain a claim for an assignment of dower, upon his conviction of polygamy: *Rev. Code Md. 1878*, p. 807; or his sentence to imprisonment for life for any crime: *Mich. Comp. L. 1871*, p. 1466, sec. 5; and p. 1469, sec. 24; or the entry against him of a decree of divorce because of his misconduct: *Davol v. Howland*, 14 Mass. 219; *Scribner on Dower*, c. 21.

The Time for the Assignment of Dower cannot commence until the death

of the husband, except in those states in which statutes have been enacted perfecting the right of the wife on his imprisonment for life, or upon the granting of a divorce, or on some other contingency designated in such statute. But immediately after his death his widow is entitled to be endowed. Probably at an early day various devices were resorted to for the purpose of prejudicing the interests either of the heir or of the doweress, as when she remained in possession of the mansion house without proceeding to have dower assigned to her, or the heir, deeming it his interest to do so, postponed the assignment of dower as long as possible, in order that he might have exclusive possession of the property of his ancestor. At all events "by Magna Charta it was required that dower should be set out to her within forty days after the death of her husband, during which time it was stipulated that she might remain in her husband's mansion house": 2 Scribner on Dower, 54, 71. The time within which her dower should be assigned has been fixed by statute in many portions of the United States, by some of which it is left at forty days after the death of her husband, while in others a different period is named: Stimson's American Statute Law, sec. 3271. In Virginia it is said that the assignment should be as soon as practicable after his death, and that she may maintain an action for such assignment within a year after such death, or within three months after demand: *Iaeger v. Bossieux*, 15 Gratt. 83; 76 Am. Dec. 189. The more important and difficult question is to determine whether, and if so, when, the right to the assignment will be barred or terminated from failure to enforce it. In several of the states there is a statute of limitations specially applicable to proceedings for the assignment of dower, and the right to such assignment is lost by inaction for the time designated in such statutes: Stimson's American Statute Law, sec. 3271. In the absence of any statute relating specially to the proceeding it is the better opinion that general statutes of limitation are not applicable to proceedings for the assignment of dower: 2 Scribner on Dower, 559; *May v. Rumney*, 1 Mann. 1; *Jones v. Powell*, 6 Johns. Ch. 194; *Phares v. Walters*, 6 Iowa, 106; *Parker v. Obear*, 7 Met. 24; *Barnard v. Edwards*, 4 N. H. 107; 17 Am. Dec. 403; *Wright v. Conover*, 6 N. J. Eq. 482; *Wells v. Beall*, 2 Gill & J. 468; *Sellman v. Bowen*, 8 Gill & J. 50; 29 Am. Dec. 524; *Kiddall v. Trimble*, 1 Md. Ch. 143; *Guthrie v. Owen*, 10 Yerg. 339; *Tooke v. Hardeman*, 7 Ga. 20; *Spencer v. Weston*, 1 Dev. & B. 213; *Wakeman v. Roache*, Dud. (Ga.) 123; *Miller v. Pence*, 132 Ill. 151, though the minority of the courts have applied, as against such proceedings, statutes of limitation addressed to actions affecting the possession of real property, and have held that as an assignment must result in depriving the tenant of his possession, or some part thereof, he is within the protection of the statute: *Durham v. Angier*, 20 Me. 242; *Conover v. Wright*, 6 N. J. Eq. 613; 47 Am. Dec. 213; *Care v. Keller*, 77 Pa. St. 487; *Tuttle v. Wilson*, 10 Ohio, 24; *Ralls v. Hughes*, 1 Dana, 407; *Kinsolving v. Pierce*, 18 B. Mon. 782; *Torrey v. Minor*, 1 Smedes & M. Ch. 489; *Ramsay v. Dozier*, 1 Treadw. Const. 112; *Caston v. Caston*, 2 Rich. Eq. 1; *Wilson v. McLenaghan*, 1 McMull. Eq. 35. Even where this latter view prevails, as the wife has no right of action until the death of her husband, no statute can run against her before that date, and therefore no disseisin of her husband, however long continued, can affect her if she proceeds within due time after such death: *Durham v. Angier*, 20 Me. 242; *Moore v. Frost*, 3 N. H. 126; *Hart v. McCollum*, 28 Ga. 478; *Williams v. Williams*, 89 Ky. 381; *Farmer v. Ray*, 42 Ala. 125; 94 Am. Dec. 633; *Miller v. Pence*, 132 Ill. 151. If, how-

ever, she resorts to a court of equity for redress, she is not exempt from the rules of that court respecting laches, under which it refuses to interpose in favor of persons who have not proceeded with reasonable diligence, as when a widow delayed the assertion of her rights for twenty years after the death of her husband: *Barksdale v. Garrett*, 64 Ala. 277; 38 Am. Rep. 6.

By Whom Dower May be Assigned.—The assignment of dower is not necessarily a judicial act or proceeding, and may therefore be accomplished without the aid of any court or judicial officer: *Austin v. Smith*, 50 Mo. 74; 79 Am. Dec. 597. Nor need it, like a judicial act, be performed by a disinterested person. On the contrary, the person representing what may properly be regarded as the adverse interest is authorized to assign dower, and this though he is an infant: *McCormick v. Taylor*, 2 Ind. 336; *Young v. Tarbell*, 37 Me. 509; *Jones v. Brewer*, 1 Pick. 314; *Moore v. Waller*, 2 Rand. 418, the general rule upon the subject being that whoever may, by adverse proceedings against him, be compelled to make or submit to an assignment of dower, may make such assignment voluntarily. He must be a tenant of the freehold. It is not sufficient that he have a leasehold or a chattel interest, nor, on the other hand, is it essential that he have any title to the property, if he has possession of it under a claim of title. Though he is a mere deaseisor, the widow is not obliged to wait until the heir or other person lawfully entitled recovers the seisin or possession, but may proceed to have the assignment of dower made by any person in possession claiming in his own right: 2 Scribner on Dower, 76. In the United States the power to assign dower vested by the common law in an infant tenant of the freehold has very generally, either as a consequence of judicial or of legislative action, been vested in his guardian: *Young v. Tarbell*, 37 Me. 509; *Jones v. Brewer*, 1 Pick. 314; *Robinson v. Miller*, 1 B. Mon. 88; *Boyers v. Newbanks*, 2 Ind. 388; *Curtis v. Hobart*, 41 Me. 230. *Contra: Ex parte Guernsey*, 21 Ill. 443; *Bonner v. Peterson*, 44 Ill. 253. If two or more persons are at the same time tenants of the freehold, as where it is held by tenants in common, the right to assign dower is vested in either: 2 Scribner on Dower, 79.

If an assignment of dower, made by a tenant of the freehold, were obligatory as against the doweress, so that she must accept it whether just or not, his natural partiality towards his own interest must have resulted in many inequitable assignments. While in the standard treatise upon dower we find a chapter devoted to excessive assignments, and to the admeasurement of dower when the heir, forgetful of his own interests, or incompetent to protect them, has assigned too great a portion to the doweress, we can discover nothing respecting the more probable contingency of his being unfair towards her by assigning to her less than her just proportion of the lands of her deceased husband. If the tenant, while an infant, made an excessive assignment, he could obtain relief by a writ for the admeasurement of dower; but he was not entitled to this, or any, remedy, if he was of full age when he made the assignment, and not under any disability: Scribner on Dower, c. 28. While this author does not point out any method of questioning an assignment of dower made by an heir or other tenant of the freehold, nor state, in direct terms, that such assignment is effective only when accepted by the widow, we apprehend that, unless so accepted, it was always subject to be questioned in some appropriate proceeding, because, in speaking of an assignment of dower without legal proceedings, the same author says: "The person on whom the right or duty

is devolved to make an assignment may at once proceed to set apart to the widow her proportion of the estate, and, if this be fairly done, it is as effectual and binding as if performed under a judgment or decree of court": 2 Scribner on Dower, 71. In *Austin v. Austin*, 50 Me. 74, 79 Am. Dec. 597, it is said that, "to bind the widow, it is necessary not only that the assignment be accepted, but she must also enter upon it."

An assignment made by a tenant of the freehold need not be evidenced by any deed or other writing: *Johnson v. Neil*, 4 Ala. 166; *Conant v. Little*, 1 Pick. 189; *Blood v. Blood*, 23 Pick. 80; *Shattuck v. Gragg*, 23 Pick. 88; *Curtis v. Hobart*, 41 Me. 230; *Johnson v. Morse*, 2 N. H. 48; *Meserve v. Meserve*, 19 N. H. 240; *Baker v. Baker*, 4 Me. 67; *Jones v. Brewer*, 1 Pick. 314; *Pinkham v. Gear*, 3 N. H. 163; *Lenfers v. Henke*, 73 Ill. 405; 24 Am. Rep. 263. "The widow, being entitled by common right, nothing is required but to ascertain her share; and when that is accomplished by the assignment, and she has entered, the freehold vests in her without livery of seisin or writing. And it is true, not only when the dower is assigned in the manner prescribed by law, but also where a different mode of assignment is adopted by agreement; as, where the rent issuing out of lands or an undivided third part is allotted to the widow": 2 Scribner on Dower, 73.

The Remedies for the Assignment of Dower, other than having it assigned by the tenant of the freehold, were by the common law, "by writ of dower *unde nihil habet*, or by writ of right of dower brought against the tenant of the freehold, upon which, after the demandant obtained judgment, dower is assigned by the sheriff on the land, and she may then proceed to recover possession by ejectment." The judgment, "generally speaking, is to recover seisin of the third part of the tenements in demand, in severalty, by metes and bounds, by the mesne profits, and damages. But if judgment is obtained against several tenants in common it is error for it to state 'in severalty, by metes and bounds'; but it may be in three parts, to be divided": 2 Scribner on Dower, c. V, pp. 91, 105. While the common-law mode of procedure may still be resorted to in some portions of the United States, in the majority of the states statutes have been enacted upon this subject prescribing the circumstances upon which the action or proceeding for the assignment of dower may be made, the judgment to be entered therein, and the mode in which it may enforced: 2 Scribner on Dower, c. VI; but the scope of this note does not include a statement of these statutory provisions. At an early day courts of equity in England assumed jurisdiction in proceedings for the assignment of dower as ancillary to proceedings at law, and only in cases in which those proceedings were inadequate to afford complete relief: *Pomeroy's Equity Jurisprudence*, secs. 1380, 1381. At the present time the jurisdiction of courts of equity is concurrent with that of courts of law in all cases of dower in legal estates, and is exclusive over all assignments of dower in equitable estates: *Pomeroy's Equity Jurisprudence*, secs. 1382, 1383; 2 Scribner on Dower, c. VII.

As to the Modes by Which Dower Is Set Apart to the widow, the first was known as an assignment according to common right, and, as required by common law, was "one-third part of the lands and tenements of which the widow is dowable, to be set out by metes and bounds, where it is practicable, and to be held by her for life. The endowment, therefore, must be of a parcel of the lands or tenements themselves. Such is the widow's

common-law right, and the heir or tenant of the freehold should make the assignment": 2 Scribner on Dower, 80. This mode still prevails in the United States, where it can be pursued without injustice to the parties interested: Stimson's American Statute Law, sec. 3276. If the interest of the husband consisted of an estate in cotenancy, of which each of his cotenants was entitled to share the possession, the assignment of any specific part to the widow was impossible, because she had no right to dispossess any of the surviving cotenants of any part of the property. She must, therefore, be given her part of the share of her deceased husband, to be held in common with the share of the other cotenants: 2 Scribner on Dower, 80. If, on the other hand, her husband was seised of several distinct parcels of land, the assignment might, with her consent, set apart to her one or more of the parcels to the exclusion of the others, if the part so given her was equivalent only to her share of the whole; but if the husband had, in his lifetime, alienated any of such parcels, then the interest of the alienee, or his successor or successors in interest, could not be prejudiced by the assignment to the widow of more than one-third of any distinct parcel so alienated: *Scott v. Scott*, 1 Bay, 504; 1 Am. Dec. 625; *Thomas v. Hesse*, 34 Mo. 13; 84 Am. Dec. 66; *Fordick v. Gooding*, 1 Greenl. 30; 10 Am. Dec. 25; *Cook v. Fisk*, 1 Walk. (Miss.) 423; *Coulter v. Holland*, 2 Harr. (Del.) 330; *Hardin v. Lawrence*, 40 N. J. Eq. 154; *Schnelly v. Schnelly*, 26 Ill. 116; *French v. Peters*, 33 Me. 396; *Wood v. Lee*, 5 T. B. Mon. 50; *Matter of Garrison*, 15 N. J. Eq. 393. *Contra: Platt's Appeal*, 56 Conn. 572. If, where the interests of the alienees are not involved, it is apparent to the court that an assignment of dower may be made by giving the widow one tract equal in value to her interest in the several tracts, and that such an assignment will be for the interest of all the parties, or at least will not be prejudicial to any, it is proper for the court to set aside to her a single tract, instead of scattering the assignments over all the tracts: *Milton v. Milton*, 14 Fla. 369; *Jones v. Brewer*, 1 Pick. 314; *Scott v. Scott*, 1 Bay, 504; 1 Am. Dec. 625; *Montgomery v. Horn*, 46 Iowa, 285; *Price v. Price*, 41 Hun, 486; *Schnelly v. Schnelly*, 26 Ill. 116; *French v. Peters*, 33 Me. 381, 396; *Morrill v. Menifee*, 5 Ark. 629; *Rowand v. Carroll*, 81 Ill. 224; *Fordick v. Gooding*, 1 Me. 30; 10 Am. Dec. 25; *Lawson v. Morton*, 6 Dana, 471; *Corriell v. Bronson*, 6 Iowa, 471. But see *Wood v. Lee*, 5 T. B. Mon. 50; *Wilhelm v. Wilhelm*, 4 Md. Ch. 330; *Gibson v. Marshall*, 6 Rich. Eq. 210. If the property out of which the assignment is to be made consists of a building used as a dwelling or otherwise an assignment may be made to the widow, with her consent, of one or more rooms, or parts of such building: *White v. Story*, 2 Hill, 543; *Stewart v. Smith*, 39 Barb. 167; *Miles v. Douglas*, 34 Conn. 393; *Symmes v. Drew*, 21 Pick. 278; *Parks v. Hardey*, 4 Bradf. 15; *Patch v. Keeler*, 27 Vt. 252. At the common law the heir could not be compelled to assign to a doweress "the capital messuage which was his father's, nor any part thereof, although she was dowable of the same, but might assign to her other lands or tenements in lieu thereof." In the United States, on the other hand, various statutes have been enacted, either directing or favoring the assignment to the widow of the homestead or dwelling-house, where such assignment can be made without injury to the remainder of the premises, or to the rights of the heir or heirs: 2 Scribner on Dower, 81.

An assignment of dower not according to common right was naturally called an assignment contrary to common right; and, as we understand, was any assignment not made by metes and bounds, where such assignment

was practicable. There were many interests in which a widow was entitled to dower, in which it was clear that her share could not be set aside to her, to be held in severalty by metes and bounds, without injustice to her, or to the heir, or both. In some of these instances an assignment of a share of the profits was made, as where the property consisted of a mill, or ferry, entitled to collect tolls, or lands from which rents would accrue: *Chase's case*, 1 Bland, 206; 17 Am. Dec. 277; *Peyton v. Smith*, 2 Dev. & B. Eq. 325; *Smith v. Smith*, 5 Dana, 179; *Rockwell v. Morgan*, 13 N. J. Eq. 384; *Stevens v. Stevens*, 3 Dana, 371. The assignment to a widow of something in lieu of dower must be "either of some part of the lands of which she is dowable, or of the rents issuing out of them," and for such an interest as may endure for her life.

Courts of equity sometimes decree, or award, a doweress a sum of money in lieu of, or as compensation for, dower. It may happen that the lands have been sold in satisfaction of some paramount lien or claim, and a surplus realized, which, for the purpose of assigning dower, is treated as real property, and an assignment is made to the widow out of such surplus: 2 Scribner on Dower, 170, 171, 647; *Thompson v. Cochran*, 7 Humph. 72; 46 Am. Dec. 68; *Daniel v. Leitch*, 13 Gratt. 195; Pomeroy's Equity Jurisprudence, sec. 1383. Though no sale is made under any paramount claim or lien, it may be found impossible to equitably assign dower, otherwise than by giving the widow a compensation in money. In these cases the courts usually make an estimate of the present value of the widow's interest dependent upon her age, and consequent expectation of life: Scribner on Dower, c. 24; *Gordon v. Tweedy*, 74 Ala. 232; 49 Am. Rep. 813; *Mandel v. McClave*, 46 Ohio St. 407; 15 Am. St. Rep. 627; *Buzick v. Buzick*, 44 Iowa, 259; 24 Am. Rep. 740; *Crosby v. Farmers' Bank*, 107 Mo. 436; *Gore v. Townsend*, 105 N. C. 228; *Nye v. Patterson*, 35 Mich. 415. The sum thus found to be due may be raised by the sale of the property; but, in the absence of statutes authorizing a sale under other circumstances, the widow may insist upon an assignment by metes and bounds, and a sale and compensation in money cannot be decreed, unless such assignment is found to be impossible: *White v. White*, 16 Gratt. 264; 80 Am. Dec. 706; *Pierce v. Williams*, 3 N. J. L. 709; *Blossom v. Blossom*, 9 Allen, 254; *Leggett v. Steele*, 4 Wash. C. C. 305; *Laidley v. Kline*, 8 W. Va. 218; *Tygh v. Dolan*, 95 Ala. 269; *Atkin v. Merrell*, 39 Ill. 62; *Heyward v. Cuthbert*, 3 Brev. 482; *Smith v. Smith*, 6 Lans. 313; *Carter v. Stookey*, 35 Ill. 279; *Summers v. Donnell*, 7 Heisk. 565; *Dolan v. Dolan*, 91 Ala. 152; *Benner v. Evans*, 3 Penr. & W. 454.

Whether an assignment of dower is made between the doweress and the heir, or between her and an alienee of her husband, it will be necessary to estimate the value of the property for the purpose of making the assignment just to both parties. While it is often said, in general terms, that a widow is entitled to be endowed of one-third of the real property of which her husband has been seised during the marriage, it is evident that this does not signify one-third in quantity, but one-third in rental value, and that an assignment to her may properly be of much more, or much less, than one-third of the quantity or area of her husband's realty. The object of dower and of its assignment is obviously to afford means of support out of the real property of her husband, and that such dower should in income-producing power be equivalent to one-third of the whole of his realty. If such were not the case, she might be left dependent and helpless, though a share were assigned to her of real property of greater value than all the residue of the

estate, if it were in such a condition or of such character that it could not, without the expenditure of large sums, realize any considerable income. Hence, while it has sometimes been said that the commissioners should "set off the one-third in value of the estate" (*Matter of Watkins*, 9 Johns. 245; *Gibson v. Marshall*, 6 Rich. Eq. 210), the more equitable rule is one which makes the probable rents and profits during her life the chief subject of consideration, and seeks to make such an assignment as will give the widow one-third of the income of the real property: *McDaniel v. McDaniel*, 3 Ired. 61; *Leonard v. Leonard*, 4 Mass. 533; *Scammon v. Campbell*, 75 Ill. 223; *Conner v. Shepherd*, 15 Mass. 164; *Smith v. Smith*, 5 Dana, 179; *Carter v. Parker*, 28 Me. 509; *Taylor v. Lusk*, 7 J. J. Marsh. 636.

As between the heir and the widow, the property is to be considered as it exists at the time the assignment is made, though its value or income-producing capacity has been increased by improvements erected by the heir, or has decreased from some cause, during the period intervening between the death of the husband and the making of the assignment: *Thompson v. Morrow*, 5 Serg. & R. 289; 9 Am. Dec. 359; *Hale v. James*, 6 Johns. Ch. 258; 10 Am. Dec. 328; *Catlin v. Ware*, 9 Mass. 218; 6 Am. Dec. 56; *Powell v. Monson etc. Mfg. Co.*, 3 Mason, 347.

When an Assignment Is to be Made Out of Lands Which Have Been Alienated by the Husband, and in which the widow has not relinquished her right of dower, a different rule prevails, at least as to enhancements in value arising from improvements made, or other labor bestowed, by the alienee. There are many cases in which the general declaration is made that, in estimating the widow's right of dower, when lands have been alienated by her husband, their value at the date of the alienation is alone to be considered: *Humphrey v. Phinney*, 2 Johns. 484; *Walker v. Schuyler*, 10 Wend. 480; *Thompson v. Morrow*, 5 Serg. & R. 289; 9 Am. Dec. 359; *Allan v. Smith*, 1 Cow. 180; *Dolf v. Bassett*, 15 Johns. 21; *Russell v. Gee*, 2 Mill Const. 254; *Wilson v. Oatman*, 2 Blackf. 223; *Brown v. Duncan*, 4 McCord, 346; *Shirtz v. Shirtz*, 5 Watts, 255; *Ayer v. Spring*, 9 Mass. 8; *Catlin v. Ware*, 9 Mass. 218; 6 Am. Dec. 56; *Ayer v. Spring*, 10 Mass. 80; *Gore v. Brazier*, 3 Mass. 523; 3 Am. Dec. 182; *Stearns v. Swift*, 8 Pick. 532; *Dorchester v. Coventry*, 11 Johns. 510; *Shaw v. White*, 13 Johns. 179; *Hale v. James*, 6 Johns. Ch. 258; 10 Am. Dec. 328; *Van Gelder v. Post*, 2 Edw. Ch. 577; *Tod v. Baylor*, 4 Leigh, 498; *Smith v. Addleman*, 5 Blackf. 406; *Parks v. Hardey*, 4 Bradf. 15; *Waters v. Gooch*, 6 J. J. Marsh. 586; 22 Am. Dec. 108. These decisions, upon examination, will be found applicable only to those cases in which the alienee, or his successors in interest, have added to the value or the productive capacity of the property by labor done or expenditures made, and do not support the contention that such alienee shall account for depreciation occurring after the conveyance to him, or shall be entitled to hold all the enhancements in value arising from causes not attributable to his labor or advancements: *Powell v. Monson etc. Mfg. Co.*, 3 Mason, 347; *Barney v. Frowner*, 9 Ala. 901; *Sumners v. Babb*, 13 Ill. 483; *Smith v. Addleman*, 5 Blackf. 406; *Hobbs v. Harvey*, 16 Me. 80; *Bowie v. Berry*, 3 Md. Ch. 359; *Green v. Tennant*, 2 Harr. (Del.) 336; *Fritz v. Tudor*, 1 Bush, 28; *McClunahan v. Porter*, 10 Mo. 746; *Bell v. Mayor etc.*, 10 Paige, 49; *Thompson v. Morrow*, 5 Serg. & R. 289; 9 Am. Dec. 358; *Winder v. Little*, 1 Yeates, 152; *Thorpe v. Johnson*, 3 Ind. 343; *Jonas v. Hunt*, 40 N. J. Eq. 660; *Young v. Thrasher*, 115 Mo. 222; *Mahoney v. Young*, 3 Dana, 588; 28 Am. Dec. 114; *Van Doren v. Van Doren*, 3 N. J. L. 697; 4 Am. Dec. 408; *Pierce v. O'Brien*, 29 Fed. Rep. 402; *Hazen v. Thur-*

ber, 4 Johns. Ch. 604; *Rannels v. Washington University*, 96 Mo. 226; *Brazton v. Coleman*, 5 Call, 433; 2 Am. Dec. 592.

Though a widow cannot be prejudiced by a voluntary conveyance made by her husband, on the other hand such conveyance cannot give her advantages to which she would not otherwise be entitled, and the interests of the alienee are guarded and protected so far as may be without prejudicing the wife. As a consequence of this rule, she is not entitled to have an assignment made which will defeat or impair the alienee's interest, and, therefore, if, as we have already shown, the husband had several distinct parcels of realty in which his wife has a right to dower, and some, or all of them, have been conveyed by her husband in separate parcels, or, though not conveyed by him in such parcels, they have, after his conveyance, been alienated by his alienees, so that his title has become vested in different sub-alienees, the rights of all these will be protected, and, therefore, the assignment of dower must be in each separate parcel, though, but for the conveyance, the widow might elect to receive an assignment of a single tract to be held in severalty in satisfaction of her interest in the whole: 2 Scribner on Dower, 603; *Thomas v. Hesse*, 34 Mo. 13; 84 Am. Dec. 66; *Fosdick v. Gooding*, 1 Greenl. 30; 10 Am. Dec. 25; *Boyd v. Carlton*, 69 Me. 200; 31 Am. Rep. 268. When an alienee has made improvements, one mode of giving him the benefit of them is, where that course can be pursued without prejudice to the interests of the widow, to so assign her dower as not to include any part of the premises on which such improvements are situate: *Leggett v. Steele*, 4 Wash. C. C. 305; *Coates v. Cheever*, 1 Cow. 460. Improvements must be distinguished from ordinary repairs. The assignment may be made without taking any notice of them, as they are not regarded as creating any special equity in favor of the tenant of the freehold: *Walsh v. Wilson*, 131 Mass. 535. An alienee's claims or equities cannot be recognized to the extent of depriving the widow of rights to which she must have become entitled had the husband not undertaken to alienate the property in question. Therefore, its enhancement in value from extrinsic causes created or operating after the alienation results in her benefit, as well as in that of the alienee: *Thompson v. Morrow*, 5 Serg. & R. 289; 9 Am. Dec. 358; *Gore v. Brazier*, 3 Mass. 523; 3 Am. Dec. 182; 2 Scribner on Dower, 626-629. If, on the other hand, the lands have diminished in value since the alienation, their value must be estimated as of the date of the assignment, though such diminution was due to their depreciation from use or from acts of waste occurring in the lifetime of the husband, and attributable to the tenant in possession, or from other causes: *Dunsmeth v. Bank*, 6 Ohio, 76; *Beavers v. Smith*, 11 Ala. 20; *Hale v. James*, 6 Johns. Ch. 258; 10 Am. Dec. 328; *Fritz v. Tudor*, 1 Bush, 28; *Brazton v. Coleman*, 5 Call, 433; 2 Am. Dec. 592, and the principal case. But see *McClanahan v. Porter*, 10 Mo. 746; 2 Scribner on Dower, 634. While, as we have shown, the widow could not elect to have her dower in several parcels of land so assigned as to prejudice an alienee of one or more of those parcels, by setting apart out of one parcel any more than one-third thereof, it is not equally clear that the alienee, on his part, cannot in some cases retain the entire realty conveyed to him, by compelling the widow to accept her assignment of dower out of other parcels not so conveyed. Certainly, if the conveyance was with warranty, and the assignment of dower may be equitably made without giving to the widow any part of the lands so conveyed, this course should be pursued: 2 Scribner on Dower, 106; and perhaps in

other instances where the purchaser has special equities an assignment may properly be made which will leave him in possession of all the property conveyed by the husband: *Wood v. Keyes*, 6 Paige, 478; *Lawson v. Morton*, 6 Dana, 471.

As to the Law Under Which the Assignment Must Be Made there is some difference of opinion. If, as we have shown, the right to dower is not a vested interest, and is, therefore, until it becomes vested, within the control of the legislature, it must follow that there can be no right to dower unless it existed at the death of the husband. Therefore, both the right to dower and the mode of assignment are controlled by the law in force at such death: *Walker v. Deaver*, 5 Mo. App. 139; *Parker v. Small*, 55 Iowa, 732; *Boyd v. Harrison*, 36 Ala. 533; *Thomas v. Hesse*, 34 Mo. 13; 84 Am. Dec. 66; *Bennett v. Hamis*, 51 Wis. 258; *Ware v. Owens*, 42 Ala. 212; 94 Am. Dec. 642, and note. The interest of an alienee is, on the other hand, a vested interest, and not subject to subsequent legislative impairment. Therefore, if, after a conveyance is made, in which the wife of the grantor did not join, a statute is enacted enlarging the right of dower, as by changing it from an estate for life into an estate in fee, such statute does not apply to pre-existing conveyances, nor entitle the widow to any greater interest in land already conveyed than she would have acquired had her husband died before the enactment of the statute: *Moore v. Kent*, 37 Iowa, 20; 18 Am. Rep. 1.

Rents and Profits.—By the common law a tenant of the freehold, whether he was an heir or an alienee of the husband, was entitled to the possession of the realty, and to receive the rents and profits thereof until a judgment was entered for the recovery of dower, and hence there could be no recovery by a widow for rents and profits during the time that the assignment of dower was withheld. By the statute of Merton, 20 Henry III., c. 1, the common-law rule was changed, and widows became entitled as against persons guilty of a wrongful forfeiture to damages consisting of the "value of the whole dower to them belonging, from the death of their husbands until the date that the said widows, by judgment of our court, have recovered seisin of their dower." This statute has been substantially adopted in the greater portion of the United States. Hence, a doweress may now recover dower estimated from the death of her husband, or, in some states, from the time of demand for dower in all cases where he died seised of the property: *Waters v. Williams*, 38 Ala. 680; *Norton v. Norton*, 94 Ala. 481; *May v. May*, 7 Fla. 207; 68 Am. Dec. 431; *Shoot v. Galbreath*, 128 Ill. 215; *Atkin v. Merrell*, 39 Ill. 62; *Nicoll v. Ogden*, 29 Ill. 323; 81 Am. Dec. 311; *Peyton v. Jeffries*, 50 Ill. 143; *Strawn v. Strawn*, 50 Ill. 256; *Sellman v. Bowen*, 8 Gill & J. 50; 29 Am. Dec. 524; *Walsh v. Reis*, 50 Ill. 477; *Wheeler v. Dawson*, 63 Ill. 54; *Galbreath v. Gray*, 20 Ind. 290; *O'Ferrall v. Simplot*, 4 Iowa, 381; *Felch v. Finch*, 52 Iowa, 563; *Peirce v. O'Brien*, 29 Fed. Rep. 402; *Chase's case*, 1 Bland. 206; 17 Am. Dec. 277. "By the words of the statute damages are given from the death of the husband to the date the widow recovers seisin by judgment. By damages are to be understood, according to the English authorities, the profits of the third part of the estate since the death of the husband (after deducting outgoings), and such additional sum as will compensate the widow for any further loss she may have sustained by the detention of her dower": 2 Scribner on Dower, 704, c. 25. If the lands have been in possession of an alienee of the husband, and not of his heir, the widow may recover damages, though the husband did not die

seised, but such damages must be computed from the demand and refusal of dower, and not from the death of the husband: 2 Scribner on Dower, 709-718; *Sellman v. Bowen*, 8 Gill & J. 50; 29 Am. Dec. 524; *Darnatt v. Hill*, 12 Gill & J. 388; *Chase's case*, 1 Bland. 206; 17 Am. Dec. 277; *Wells v. Beahm*, 2 Gill & J. 468; *Price v. Hobbs*, 47 Md. 359; *Leavitt v. Lamprey*, 13 Pick. 382; 23 Am. Dec. 685; *Perry v. Goodwin*, 6 Mass. 498; *Whitaker v. Green*, 129 Mass. 417; *Brown v. Bronson*, 35 Mich. 419; *Rannels v. Washington University*, 96 Mo. 226; *Griffin v. Regan*, 79 Mo. 73; *Young v. Thrasher*, 115 Mo. 222; *McClanahan v. Porter*, 10 Mo. 746; *Rankin v. Oliphant*, 9 Mo. 239; *Collier v. Wheldon*, 1 Mo. 1; *O'Flaherty v. Sutton*, 49 Mo. 583. But in some of the states the recovery may be only from the commencement of the suit: *Garton v. Bates*, 4 B. Mon. 366; *Waters v. Gooch*, 6 J. J. Marsh. 586; 22 Am. Dec. 108; *Kendall v. Honey*, 5 T. B. Mon. 283; *Golden v. Maupin*, 2 J. J. Marsh. 236; *Taylor v. Brodrick*, 1 Dana, 346; *Marshall v. Anderson*, 1 B. Mon. 198. But see *Lindsey v. Stevens*, 5 Dana, 104; *Yancy v. Smith*, 2 Met. (Ky.) 408.

FOLEY v. FELRATH.

[98 ALABAMA, 176.]

A SALE IS a transfer of the absolute or general property in a thing for a price in money.

A SALE IS NOT COMPLETE, but remains executory, if any thing is yet to be done by either party before delivery, as, for example, to determine the price, quantity, or identity of the thing sold.

SALES, LOSS OF GOODS ON WHOM MUST FALL.—If a sale is complete, and the goods perish without the fault of the seller, the purchaser is bound to pay the purchase price.

UPON A SALE IN WHICH THE VENDEE RETAINS THE RIGHT TO REJECT OR RETURN the goods sold, the title passes subject to being divested by the exercise of the option to rescind, expressed within a reasonable time.

SALES.—AN OPTION TO RETURN GOODS PURCHASED if the vendee should not like them is very different from an option to purchase them if he should like them. In the first case they are his property until he exercises his option, and in the second they are not his property until after the option has been exercised.

SALE WITH PRIVILEGE TO RETURN.—The loss of property which has been purchased with the privilege of returning it and rescinding the sale must be borne by the purchaser, and the sale considered as absolute if such loss occurs before the option has been exercised.

SALES—QUESTION FOR JURY.—When a contract of sale is in writing its construction is for the court and not for the jury to determine.

Pillans, Torrey, and Hanaw, for the appellant.

Faith and Ervin, for the appellee.

¹⁷⁷ HARALSON, J. Foley sued Felrath for five hundred and two dollars and fifty-six cents, for merchandise, goods, and chattels, sold by him to said Felrath on the 1st of August, 1892; and on open account, and on account stated for like amounts.

It was claimed by the plaintiff, and he so testified, that he was a manufacturer of gold pens in New York city; that on the 8th of March, 1892, he was in Mobile, Alabama, and while there was in the store of defendant, and sold him a bill of goods in his line for five hundred and two dollars and fifty-six cents; that the goods were accordingly shipped to the defendant by plaintiff, by the Adams Express Company, for which said company gave him a receipt; that at the time of the sale its terms and details were written down by plaintiff, one-half to be secured by defendant's note, at four months, and one-half at six months; the last note, if all the goods were not sold in that time, might be paid in goods not sold, at defendant's option; that the sale was absolute, and not conditional; that defendant, after he had received the goods, notified him that he had returned them by the express company, and afterwards the company brought the box of goods to ¹⁷⁸ plaintiff, and he would not receive them, because they were defendant's.

The defendant contradicted this evidence of the plaintiff, and testified that plaintiff came into his store, and representing himself as a large manufacturer of gold pens and novelties in that line, asked him to take the agency for him for the sale of his goods in Mobile, and, as the result of their interview, defendant agreed to accept the agency, and that plaintiff should ship him, as such agent, five hundred dollars' worth of his goods for sale; that plaintiff represented that such goods should be "good sellers," and told defendant that he would not be required to pay out any of his own money for the goods, and plaintiff was to send out, at his own expense, private letters and cards, the printing to be paid for by defendant; that he agreed to take the agency, provided the goods shipped were as represented, and he was to pay no money; that plaintiff said that he could not let his goods go on four months' time unless defendant would give him a note which he could use as collateral to borrow money, and on the assurance that defendant would not have to pay the note, for the reason that before it matured he would have sold goods

enough to meet it, he gave him a note for two hundred and fifty dollars, not as purchase money, but as accommodation, and plaintiff was to send the goods for examination before he would accept them; that they were to be such as would be salable in the Mobile market; that the goods afterwards came by express, according to invoice, sent with them, but were immediately returned to plaintiff, because not such as were promised to be sent, and were old style and unsalable.

A correspondence immediately sprang up between them, in which the one contended there was an absolute sale, and he would not receive the goods back, but would hold the other responsible for their value; and the other that the transaction was not a sale, but an agency, and he would have nothing more to do with the goods, and would not pay for them.

Finally, however, as the result of this correspondence, the defendant wrote to the plaintiff, under date of April 21, 1892, to the following effect: "I have reconsidered the matter, and will accept the goods, on condition that you exchange some high-priced goods, which I will return, for cheaper articles, more suitable for this market. Please favor me with the retail selling price of said line of goods in the north. I do not understand the invoice you sent me, and therefore would like for you to send me another, more explicit, ¹⁷⁹ giving the net retail price, and then allow me the discount; also, send the showcase as promised. Let goods come along."

To this letter, the plaintiff, on April 25th, after it was received, replied: "Thanks. Had much trouble, but all right now. Have sent you showcase, and have told express company to deliver your goods. Most are marked, and you will find retail prices in this green circular, as sold by dealers here. You can exchange goods at any time. I was careful to send only good sellers, and if not, will make all to your satisfaction. I will go on mailing private letters as soon as I get answer to this. Open up goods at once, and put out big pen, and push sales, and send me this note, and let us be good friends."

The evidence tends to show that the goods were shipped back to defendant by the express company, as requested by him, and in transit were lost or destroyed in a wreck. The defendant contends that the loss is the plaintiff's; that there was no delivery of the goods, for the reason that, before accepting them, he had the right to select from the lot such

as he would return, according to the condition annexed to his agreement for them to be returned to him, and the sale, till this was done, was incomplete. On the other hand, the plaintiff maintains that the sale and delivery were complete, and the defendant is liable for the price of the goods, and must, himself, look to the express company for damages, if it has incurred liability for the nondelivery of the package.

The evidence tends to show, and it is without conflict, as to the point, that the same package of goods, and the same goods that had, in the first place, been shipped to the defendant at Mobile by the plaintiff—which he received and examined, the invoice and prices for which had been furnished to him by plaintiff, and which he returned to plaintiff, as not coming up to representations—were the identical package and goods which defendant, upon reconsideration, instructed the plaintiff to have returned to him by the express company. There was no mistake as to identity, quality, and price of goods. There had been, as we have seen, a spirited dispute between the parties, as to the character of the transaction between them, the plaintiff maintaining all the while that defendant had purchased the goods, and that they were his property. The defendant finally yielded to plaintiff's contention, and wrote, "I have reconsidered the matter, and will accept the goods, on condition that you exchange some high-priced goods, which I will return for cheaper articles, more suitable for this market." What was ¹⁸⁰ it defendant had reconsidered? It could have been nothing but the very thing the plaintiff had been so pertinaciously pressing on him: that the goods were sold and delivered to him, that the transaction was no agency, and he was liable, and must pay for what he had bought. He yielded the contention, and said: "I will accept the goods. . . . Let goods come along."

A sale has been defined to be "A transfer of the absolute or general property in a thing for a price in money": Benjamin on Sales, sec. 1. If any thing remains to be done by either party to the transaction before delivery, as, for example, to determine the price, quantity, or identity of the thing sold, the title does not vest in the purchaser, and the contract is merely executory. If the sale is complete, and the goods perish, without the fault of the seller, the purchaser is bound to pay the agreed price: *Magee v. Billingsley*, 3 Ala. 679; *Mobile Sav. Bank v. Fry*, 69 Ala. 348; *Fry v. Mobile Sav.*

Bank, 75 Ala. 473; *Allen v. Maury*, 66 Ala. 17; *Wailles v. Howison*, 93 Ala. 375; *Cleveland v. Williams*, 29 Tex. 204; 94 Am. Dec. 274; 2 Kent's Commentaries, 496.

In *Allen v. Maury*, 66 Ala. 17, we said: "Where, however, goods are sold and delivered, the terms of sale being specified, and the vendee reserves the right to reject or return, the title passes, liable to be divested by the exercise of this option to rescind, expressed within a reasonable time."

In *Greene v. Lewis*, 85 Ala. 221, 7 Am. St. Rep. 42, it was held that where a horse was sold and delivered to a purchaser, for a reasonable price, to be afterwards agreed on, the title at once passed; and the fact that the parties could not afterwards agree on a reasonable price made no difference in the character of the transaction. The court, in passing upon the question, stated: "The rule is settled that the title to personal property may pass to a vendee, without fixing an absolute price, if the circumstances attending the transaction satisfactorily show such to be the clear intention of the contracting parties: *Shealy v. Edwards*, 73 Ala. 175; 49 Am. Rep. 43; *Wilkinson v. Williamson*, 76 Ala. 163. An option to purchase, if the party to whom the goods are transferred should like, is very different from an option to return the goods if he should not like them. In the first case, the title will not pass until the transferee determines the option, if seasonably exercised; in the other, the title passes subject to the right to rescind and return, which is, in effect, a right to resell to his vendor: 2 Benjamin on Sales, sec. 915, p. 796, n. 30; *Buswell v. Bricknell*, 17 Me. 344; 35 Am. Dec. 262; *Hunt v. Wyman*, ¹⁸¹ 100 Mass. 198. The case in hand was clearly one of a sale with right to rescind and return, as to the high-priced goods.

The contract of sale between the parties, as we have seen, rested at first in parol, about the terms of which they disputed. They eventually agreed upon its terms, and that agreement is in writing. There could no longer remain any dispute about it, and no parol evidence was needed to construe it. Its construction became a question of law for the court, and not for the jury to determine: *Jones v. Pullen*, 66 Ala. 306; *Claghorn v. Lingo*, 62 Ala. 230; *Bernstein v. Humes*, 60 Ala. 582; 31 Am. Rep. 52; *Guilmartin v. Wood*, 76 Ala. 200.

It is unnecessary for us, in the view we take of the case,

to consider any of the charges given, to which exceptions were reserved, or any of the assignments of error, except the one based on the request for the general charge in favor of the plaintiff. The evidence is undisputed, and in writing, as to what the contract was, and as its proper construction makes it one of sale and delivery of goods, the court should have given the general charge for the plaintiff, as requested.

Reversed and remanded.

SALES—WHAT CONSTITUTE.—A sale of a chattel is the transfer of the property in it for a consideration, and is ordinarily perfected by the delivery of the thing sold to the buyer, and the delivery of the price therefor to the seller: *Stephens v. Gifford*, 137 Pa. St. 219; 21 Am. St. Rep. 868, and note; *Huthmacher v. Harris*, 38 Pa. St. 491; 80 Am. Dec. 502, and note; *Hill v. Hill*, 1 N. J. L. 261; 1 Am. Dec. 206.

SALES—WHEN COMPLETE.—Title cannot pass under a contract of sale when the property sold has not been identified, nor when something remains to be done for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend upon the quantity or quality of the goods: *Blackwood v. Cutting Packing Co.*, 76 Cal. 212; 9 Am. St. Rep. 199, and note; *Golder v. Ogden*, 15 Pa. St. 528; 53 Am. Dec. 618, and note; *Williams v. Allen*, 10 Humph. 337; 51 Am. Dec. 709, and note; *Pleasants v. Pendleton*, 6 Rand. 473; 18 Am. Dec. 726. A sale is executory and incomplete as long as any thing remains to be done between the buyer or seller in relation to the goods: *Cleveland v. Williams*, 29 Tex. 204; 94 Am. Dec. 274, and note. A sale of personal property is complete and passes title to the buyer although the thing sold has not been measured or the quantity ascertained in any way, when it is apparent that it is the intention of the seller to transfer the title, and of the buyer to accept it: *Sewell v. Euton*, 6 Wis. 490; 70 Am. Dec. 471, and note. See the extended note to *Tufts v. Griffin*, 22 Am. St. Rep. 866, and the note to *Love v. State*, 6 Am. St. Rep. 237.

SALES.—LOSS OF GOODS, WHEN FALLS ON PURCHASER: See the extended notes to *Tufts v. Griffin*, 22 Am. St. Rep. 866, and *McNeal v. Braun*, 26 Am. St. Rep. 451.

NORMANT v. EUREKA COMPANY.

[98 ALABAMA, 181.]

EXECUTION SALES.—THE EXECUTION OF A SHERIFF'S DEED WILL BE PRESUMED if the purchaser took possession of the land under his purchase and held it continuously thereafter in his own right for the period of thirty-five years.

ADVERSE POSSESSION.—THE POSSESSION OF A MERE TRESPASSER is confined to the premises actually occupied by him, but the possession of one claiming under color of title is co-extensive with the boundaries described in the written instrument under which he claims title.

ADVERSE POSSESSION.—POSSESSION OF LAND IS NOT PRIMA FACIE ADVERSE to the true owner.

TO CONSTITUTE ADVERSE POSSESSION the true owner must know that the adverse holder claims in his own right, or the possession must be so open and notorious as to raise the presumption of notice.

ADVERSE POSSESSION.—THE POSSESSION OF A PURCHASER AT A SHERIFF'S SALE WHO HAS NOT TAKEN OUT A DEED, or of any other purchaser who has made payment in full of the purchase price, and who has taken and retained possession, is presumed to be in his own right, co-extensive with his purchase, and adverse to the holder of the legal title. If the possession of such purchaser is continuous for the statutory period without recognition of, or subordination to, the legal title, the vendor's right of entry is barred.

EXECUTION SALE—ESTOPPEL.—The defendant in execution cannot dispute the title at an execution sale, as a general rule.

ADVERSE POSSESSION MAY BE SHOWN BY ANY ACTS suitable to the character of the land. Neither fences nor cultivation are essential to such possession when the acts of ownership are those to which the lands are adapted, and are continuous, exclusive, and hostile to the claims of others.

ADVERSE POSSESSION.—THE PAYMENT OF TAXES may be taken into consideration with other facts and circumstances relied upon to show an adverse possession of real property.

ADVERSE POSSESSION MAY BE BROKEN only by the act of the true owner, or the intrusion of a stranger, or the abandonment of the premises by the occupant himself.

ADVERSE POSSESSION IS NOT INTERRUPTED by an unknown intrusion of strangers unless continued for such a time as to become an assertion of right. If such intrusion is known, but not submitted to, nor acquiesced in, but is forthwith remedied by legal process, it does not amount to an interruption of the continuous possession.

PRESCRIPTIVE TITLE.—Adverse possession held until the claim of title has ripened into a fee necessarily destroys all outstanding legal titles.

PRESCRIPTIVE TITLE, WHEN WILL BE AIDED IN EQUITY.—One who has held possession of land under such circumstances, and for such time, that he has thereby acquired title thereto by prescription, may call upon a court of equity to establish such title, and to give him evidence thereof by entering a decree quieting his title against the person in whom the title appears to be vested by the record, if he has at the time no adequate legal remedy, but if there is an action pending against him in a court of law wherein his title may be put in issue and established there is no equity in his bill to quiet title, and it will be dismissed.

Suit against Joseph S. Smith, sheriff of Jefferson county, and James W. Normant and other heirs at law of James M. Normant, to enjoin an action of ejectment brought by the defendant in the circuit court of Jefferson county to recover possession of real property, and also to divest out of the plaintiffs in the ejectment suit the legal title to such property, and to quiet the possession of the complainants. A demurrer was interposed to the bill, and a motion made to dismiss such bill for want of equity, and to dissolve the injunction which had been granted. The demurrer was overruled, and the motion denied, and thereupon the complainants appealed.

Arnold and Evans, for the appellants.

Hewitt, Walker and Porter, for the appellees.

185 COLEMAN, J. On the thirteenth day of May, 1890, James W. Normant *et al.* instituted the action of ejectment in a court of law against appellees to recover a certain tract of land. The complainants thereupon filed the present bill in the equity court, to enjoin the prosecution of the ejectment suit, and also to have the legal title divested out of the plaintiffs in the ejectment suit, and to quiet the possession of the complainant.

The averments of the bill show that the plaintiffs in the ejectment suit are the heirs of James W. Normant who died in May, 1881, and from him derive title. The bill further shows that on the third day of September, 1855, James W. Normant was seised and possessed of the lands in controversy, that prior to that time, to wit, on the nineteenth day of March, 1855, suit in the circuit court was instituted by Joseph R. Smith and others against James W. Normant, and on the same day a copy of the summons and complaint was regularly served upon the defendant in person, and at the August term of the court, after service, recovered a judgment against him. An execution was issued upon the judgment, and was placed in the hands of the sheriff on the third day of September and by him levied upon the lands in controversy on the 2d of November, and, after legal advertisement and notice, the lands were "regularly sold by the sheriff by virtue of said execution on the third day of December, 1855." At the sheriff's sale one Hawkins bought the lands which lie in section twenty-nine, and one Bagley and James A. Mudd purchased the lands which lie in section thirty-two. The present

complainants claim by mesne conveyances duly executed from the purchasers at sheriff's sale. The claims of the complainants, through paper titles, began the latter part of the year 1872.

The bill avers that the price paid at sheriff's sale was a ¹⁸⁶ fair equivalent for the value of the land, that it was paid to the sheriff, and credited upon the judgment. The bill avers that from some cause the sheriff failed and neglected to execute deeds to said purchasers, that said Hudson (the then sheriff) has long since been dead, and that Joseph S. Smith is his successor in the office of sheriff. The bill avers that from the date of the sheriff's sale to the filing of the bill, the complainants, and those from whom they claim, have paid the taxes on the land, and that "neither Normant nor defendants ever asserted any claim to said lands until the 13th of May, 1890, when the defendants filed an action in ejectment."

The only averments as to the possession of the land by complainants and those from whom they derive title is in the tenth paragraph of the bill, and is in the following words: "Orators show that the lands hereinbefore described were, at the time of said sale, and still are, woodlands; that the soil thereof is poor, and almost entirely unsusceptible of cultivation; that at the time of the sheriff's sale aforesaid, and for years afterwards, said lands were valuable only for the firewood which could be cut therefrom, and complainants aver that such use was made of the land by the purchasers at the sheriff's sale, and their successors, for several years, that when the lands passed partly into the hands of the Red Mountain Iron and Coal Company they were used for obtaining wood to make charcoal for said iron company. That since then a sawmill was operated on said land for several years under a lease from complainants, and that complainants are now in possession." It is also averred, as we have stated, that complainants, and those from whom they derive their title, have paid their taxes on the land since the purchase at the sheriff's sale. These are the only averments in the bill to show possession of the purchasers at sheriff's sale, and their subpurchasers. It is not averred that the acts of cutting firewood, making charcoal, the lease for the purpose of a sawmill, etc., or the payment of taxes were made or done under a claim of right. Pleading must be construed

most strongly against the pleader. The averment that these acts were performed for "several years" is very indefinite. It is possible, under this averment, that no acts of ownership were exercised until after the expiration of ten years from the time of the purchase at sheriff's sale. The averment is entirely inconsistent with a total abandonment of rights acquired by the purchase at the sheriff's sale, for a period of more than ten years after such purchase. We will endeavor to declare some principles of law, which appear to ¹⁸⁷ be applicable to the facts of this case, and which may serve as a guide in its future litigation.

From the date of the sheriff's sale to the beginning of the action in ejectment the length of time was about thirty-five years. If the purchasers took possession of the land under their purchase, and held it continuously during that time in their own right under the purchase, the law would presume that a deed was executed by the sheriff. This conclusion results, necessarily, from the rule of law which prevails in this state: *McArthur v. Carrie*, 32 Ala. 76; 70 Am. Dec. 529; *Wilson v. Holt*, 83 Ala. 540; 3 Am. St. Rep. 768. The presumption of law in the present case is overcome by the positive averment of the bill that no deed was ever executed by the sheriff, and which averment on demurrer must be regarded as true against the pleader.

An important inquiry is as to the extent and character of the possession of the purchasers at sheriff's sale, if, in fact, they entered into possession of the land under their purchase. It is the law that the possession of a mere trespasser is confined to the premises actually occupied by him—"possessione pedis" limits the extent of his adverse holding. It is also settled that the possession of one claiming under color of title is co-extensive with the boundaries described by the written instrument under which he claims and holds: *Lucy v. Tennessee etc. R. R. Co.*, 92 Ala. 246; *Burks v. Mitchell*, 78 Ala. 63; *Childress v. Calloway*, 76 Ala. 133; *Stovall v. Fowler*, 72 Ala. 78.

It is further settled that mere possession of land is not *prima facie* adverse to the title of the true owner. To have this effect it must be shown that the true owner knew that the adverse holder claimed in his own right, or it must be so open and notorious as to raise the presumption of notice: *Robinson v. Allison*, 97 Ala. 596; *Dothard v. Denson*, 72 Ala. 544; *Lucy v. Tennessee etc. R. R. Co.*, 92 Ala. 246.

The purchasers in the present case at sheriff's sale obtained no paper title or instrument to mark the boundary of their purchase and possession. Possession by them under their purchase at the sheriff's sale, having paid the purchase money, would not be that of trespassers. Under the averments of the bill the purchasers had a perfect equity to the land, and had the right to compel a conveyance to them of the legal title. The statute of frauds expressly excepts from its operation contracts for the sale of land where the purchaser pays in part or in whole the purchase money, and is let into possession under his purchase.

In the case of *Ridgeway v. Holliday*, 59 Mo. 444, the rule is thus declared: "Where one buys land, pays the purchase money therefor, and enters into possession thereof, with an agreement (verbal agreement as the facts show) that a deed shall be made, there being no contingency upon the occurrence of which he is to surrender the possession to his vendor, the transaction is not an agreement to purchase, it is a sale. The contract is executed on the part of the vendee, and he does not hold under his vendor, but adversely to him." "It is not the case of a vendee holding under a bond for title, or other executory contract of purchase, where some act remains to be performed by the vendee before he can demand the legal title."

The possession of land by a purchaser under a contract of purchase who has paid all the purchase money in law is presumed to hold in his own right, and his possession, after payment of the purchase money, is adversely to his vendor. The law does not require of him further notice to his vendor that he holds adversely, and if his possession is continuous for the statutory period, without some recognition of, or subordination to, the legal estate of the vendor, the right of entry or of action to recover possession is barred. This is the accepted rule of law in this state: *Potts v. Coleman*, 67 Ala. 226; *Taylor v. Dugger*, 66 Ala. 446; *State v. Conner*, 69 Ala. 212; *Beard v. Ryan*, 78 Ala. 43; *Newsome v. Snow*, 91 Ala. 641; 24 Am. St. Rep. 934.

"The general rule is that when lands have been sold under execution, the defendant in execution, when sued by the purchaser for possession, can not dispute the plaintiff's title. The doctrine of all the cases on this point is, that the purchaser comes into exactly such estate as the debtor had:

Newell on Ejectment, 711; *Hayes v. Bernard*, 38 Ill. 297; *Ferguson v. Miles*, 3 Gilm. 358; 44 Am. Dec. 702; *Sherry v. Denn*, 8 Blackf. 552; *Jackson v. Graham*, 3 Caines, 188.

We are clearly of the opinion that a purchaser who pays the purchase money for land and takes possession of it under a legal contract of sale, whether verbal or written, has possession co-extensive with the lands included in his contract of purchase, and he may show the extent of his possession by proof of the contract of sale and purchase, that in such a case the contract will fix the boundary of his possession. This principle applies as between vendor and vendee, or, in case of execution sale, to the defendant in execution and the purchaser at such sale. It is not intended to modify or effect, in any way, the doctrine declared in the above authorities as to the possession of mere trespassers, or those who claim under color of title, but simply to declare that a ¹⁸⁹ valid contract of sale of land fixes the extent of the possession of one entering upon and holding possession under such a contract, just as the possession of one who is under color of title is limited by the description in the writings which confer color of title.

"Possession may be shown by acts suitable to the character of the land." "A fence or inclosure is not an essential element of adverse possession, but is only one of many acts indicative of possession and claim of ownership." And we may add, cultivation is not an essential element of adverse possession, when the acts of ownership are such as those to which the land is adapted, and such occupancy and use are continuous, exclusive, and hostile to the claims of others, and intended to be such: *Bell v. Denson*, 56 Ala. 449; *Doe ex dem. v. Anderson*, 79 Ala. 215; Newell on Ejectment, 725; *Sauers v. Giddings*, 90 Mich. 50. The payment of taxes is to be taken into consideration with the other facts and circumstances. Possession under a claim of right is a question of fact, the existence of which is to be determined by the conduct, acts of ownership exercised over the land, and declarations of the party in possession.

"Adverse possession once established can be broken only in one of three ways: 1. By the act of the real owner; 2. By the intrusion of a stranger; 3. By the abandonment of the premises by the occupant himself": *Doe ex dem. v. Anderson*, 79 Ala. 215.

Unknown intrusion of strangers will not interrupt the continuity of possession unless continued for such length of time as to become assertion of right": *Bell v. Denson*, 56 Ala. 449. And if such intrusions are known and not submitted to, or acquiesced in, but are forthwith remedied by recourse to legal redress, they will not amount to an interruption of the continuity of possession.

Adverse possession held until the claim and title has ripened into a fee necessarily destroys all outstanding legal titles. There can not be an absolute fee-simple title to the whole land in each of two adverse claimants at the same time. If, therefore, complainants went into possession under their purchase, and held adversely for a period sufficient to perfect their title into a fee, there can be no legal title in the complainants unless they have acquired title by a subsequent possession and adverse holding for the statutory period. The averments of the bill exclude the consideration of any title thus acquired by respondent. Notwithstanding a fee title may be acquired by adverse possession, there may be a cloud on such title, inasmuch as the record ¹⁹⁰ of titles or written evidence of title may tend to show a legal title outstanding in another, which might lead to litigation or depreciate the value of the property.

A person in possession of land having a perfect equity without having acquired the legal title may come into a court of equity and enforce a specific performance, and have his title perfected, whether or not there be a pending suit involving his right and title. If sued in ejectment, having a perfect equity, and not a legal title, he may enjoin the prosecution of the suit by bill, and a court of equity having jurisdiction to protect his equity, and to invest him with the legal title, may retain the bill upon proper averments, and do complete justice between the parties, to the extent of settling the entire litigation: *Shipman v. Furniss*, 69 Ala. 555; 44 Am. Rep. 528. See for a discussion of the question *Whitlock v. Johnson*, 87 Va. 323.

We hold further that a person in possession of land, who has a fee title acquired by an adverse possession, but without written evidence of it, or a judgment at law, or decree of a court establishing his title, there being no suit against him involving his right of possession, or the validity of his title, may come into a court of equity for relief.

In *Echols v. Hubbard*, 90 Ala. 319, the court uses this language: "If a link in the chain of title is lost, or the description in any link of the chain of title is lost, or the description in any link of that chain is so indefinite and indeterminable as to require a resort to evidence *aliunde* to identify the land really conveyed, the deed from Pope, administrator, to Patton is a cloud on her title, 'which would embarrass alienation, is calculated to engender a sense of insecurity, and may be the source of unfounded or vexatious litigation,' and which a court of equity will remove while the evidence necessary to establish the real boundaries is yet at hand.

In the latter aspect where adverse possession is relied on by the complainant, which is the case we find in this record, the right of necessity must be effectuated by extraneous evidence, and equity may always be invoked, in the absence of a legal remedy, to quiet a title thus resting in parol: See *Marston v. Rowe*, 39 Ala. 722, and other authorities to the proposition cited in the opinion.

But as was said in *Jones v. De Graffenreid*, 60 Ala. 151, "The principle on which equity intervenes to remove a cloud, or impending cloud, from the title is that the party, being in possession, can not bring an action at law to establish his title or to test its strength; and it is unreasonable ¹⁹¹ that he shall be required to stand in suspense until it suits the interest or caprice of his adversary to bring suit; his title in the mean time resting under distrust, while he is at all times liable to lose the benefit of important evidence by the death of witnesses: See *Rea v. Longstreet*, 54 Ala. 291; 3 Brickell's Digest, 355, sec. 245; *Echols v. Hubbard*, 90 Ala. 311.

It is urged as a ground of objection to the equity of the bill that the statute affords a complete remedy in a court of law. The rule in such cases is this: If the equitable right and remedy existed prior to the adoption of the act embodied in section 2916 of the code the statutory remedy therein furnished would not destroy the equitable remedy, unless the language of the statute limited the remedy to the one therein provided: *Jackson v. Jackson*, 91 Ala. 292.

The remedy invoked in this case, not being under the statute, but the equitable remedy, which exists independent of the statute, the present sheriff was not a necessary or proper party. The chancery court may appoint its register, or other proper person, to execute a conveyance, when the relief

is granted, or its own decree is sufficient to divest or invest the legal title: *Jones v. Woodstock Iron Co.*, 95 Ala. 551.

We further declare the law to be that a purchaser of land who takes possession, having paid all the purchase money, holds adversely to his vendor, and, in such case, the vendor is charged with notice of the adverse holding. A purchaser in possession of land, bought at execution sale, issued upon a judgment recovered on personal service, and, after legal advertisement, having paid the purchase money, holds adversely to the defendant in execution, and the defendant in execution upon the same principle is charged with notice that such possession is adverse. We can perceive no valid reason for holding a different rule in the case of a defendant in execution and purchaser at execution sale in such cases and a vendor and vendee.

The averments of the bill show that there was, at the time of the filing of the bill, a suit pending for the recovery of the land in a court of law, and by which complainants' legal title might be tested and established by the judgment of a court of law. Under the principles we here declared there is no equity in the bill, so far as it seeks to remove a cloud or perfect a chain of title.

The averments of the bill and the relation of the parties to each other do not admit of its consideration as a bill for specific performance against the heirs of Normant; and if it ¹⁹² could be regarded as such a bill, inasmuch as it seeks affirmative relief, the delay of thirty-five years before asserting the right is sufficient to stamp it as a stale demand.

Our conclusion is that the court erred in overruling the demurrer to the bill, and in denying the motion to dissolve the injunction. The case is reversed and remanded, that complainants may have an opportunity to amend their bill, if they can, so as to give it equity, or take such orders as they may be advised in the premises.

Reversed and remanded.

ADVERSE POSSESSION—POSSESSION WHETHER PRIMA FACIE ADVERSE TO TRUE OWNER.—There is every presumption that occupancy is in subordination to the true title, and if a possession is claimed to be adverse the act of the wrongdoer must be strictly construed, and the character of his possession clearly shown: *Preble v. Maine Cent. R. R. Co.*, 85 Me. 260; 35 Am. St. Rep. 366; *Schwallback v. Chicago etc. Ry. Co.*, 69 Wis. 292; 2 Am. St. Rep. 740, and note with the cases collected.

ADVERSE POSSESSION—HOW SHOWN.—This question is fully discussed in the monographic note to *De Frieze v. Quint*, 28 Am. St. Rep. 158; note to *Nichols v. Reynolds*, 36 Am. Dec. 242.

ADVERSE POSSESSION.—PAYMENT OF TAXES AS EVIDENCE: See the extended note to *De Frieze v. Quint*, 28 Am. St. Rep. 161; *Wren v. Parker*, 57 Conn. 529; 14 Am. St. Rep. 127, and note; and *Frick v. Sinon*, 75 Cal. 337; 7 Am. St. Rep. 177.

ADVERSE POSSESSION.—PRESUMPTION OF CONVEYANCE FROM LAPSE OF TIME.—The presumption of a grant arises from adverse possession for a long period of time: *Arnold v. Stevens*, 24 Pick. 106; 35 Am. Dec. 305, and note; *Valentine v. Piper*, 22 Pick. 85; 33 Am. Dec. 715; *Mitchell v. Walker*, 2 Aiken, 266; 16 Am. Dec. 710; *Conger v. Weaver*, 6 Cal. 548; 65 Am. Dec. 528. See, also, the extended note to *McCullough v. Wall*, 53 Am. Dec. 726.

ADVERSE POSSESSION.—PROOF OF.—This question will be found thoroughly discussed in the notes to *Smeberg v. Cunningham*, 35 Am. St. Rep. 617; *Peter v. Stephens*, 28 Am. St. Rep. 451, and the extended notes to *De Frieze v. Quint*, 28 Am. St. Rep. 158; and *Lewis v. Herndon*, 14 Am. Dec. 71.

ADVERSE POSSESSION.—HOW BROKEN: See the extended note to *Peabody v. Hewitt*, 83 Am. Dec. 497.

ADVERSE POSSESSION.—EFFECT OF TITLE BY.—The title to land by adverse possession is as effectual as that created in any other way: *Greene v. Couse*, 127 N. Y. 386; 24 Am. St. Rep. 458, and note; note to *Cannon v. Stockmon*, 95 Am. Dec. 209, where the cases are collected.

COFER v. SCROGGINS.

[98 ALABAMA, 342.]

PRACTICE.—A GENERAL OBJECTION TO EVIDENCE is properly overruled if a part of it is admissible, though another part is not.

EVIDENCE OF COLLECTIVE FACTS.—The answer of a witness, asked what improvements were on certain lands at a time designated, that "a right smart of improvements have been made in clearing and fencing," is a conclusion of facts, and as a collective fact is admissible.

ADOPTIONS.—THE ACT OF ADOPTION OF A CHILD is one by which a person takes a child of another into his own family and treats it as his own.

ADOPTION.—STATUTES AUTHORIZING THE ADOPTION OF THE CHILDREN OF OTHER PERSONS should be given a liberal intendment and operation.

AN ADOPTING PARENT assumes the duties of a natural parent, and is entitled to the custody of the child adopted, and to its services and earnings, as against all persons, except one of its parents who has not consented to the adoption.

AN ADOPTED CHILD IS ENTITLED TO THE SAME HOMESTEAD EXEMPTION as if it were the natural child of the adopting parent or parents.

THE HOMESTEAD EXEMPTION ALLOWED TO CHILDREN by the laws of Alabama terminates when they attain their majority, or cease to be *bona fide* residents of the state.

ACTION by attachment, in which certain lands were levied upon, and thereafter the defendant's adopted daughter filed a claim of exemption. The levy was in 1888. The adopted daughter, at the time of the trial, in February, 1892, was twenty-two years of age, and was a married woman, residing on the land with her husband. The wife of her adopting father died after he left the state. Judgment in the exemption contest was in favor of the adopted daughter, and plaintiff appealed.

J. W. Austin and W. T. L. Cofer, for the appellant.

George H. Parker, for the appellee.

344 HARALSON, J. The question propounded to the defendant, on her examination as a witness,—“State whether ³⁴⁵ or not you were a resident of this county and state, and whether you intended to remain so, in December, 1888?—contains two inquiries, either of which might have been differently answered. The first—whether she was a resident of this state—is a collective fact: *Pollock v. Gantt*, 69 Ala. 373; 44 Am. Rep. 519; *Hood v. Disston*, 90 Ala. 379, and was legal and pertinent, as only residents are entitled to exemptions; the second, calling for her intentions, was not: *Sternau v. Marx*, 58 Ala. 608; *Wilson v. State*, 73 Ala. 527. But it is a familiar rule that where there is a general objection to evidence, as in this instance, a part of which is legal and another part illegal, it may be overruled: *Richmond etc. R. R. Co. v. Jones*, 92 Ala. 225.

2. The questions allowed to be asked defendant, and excepted to by plaintiff—“What were the improvements on said land in 1886, when Robert Jones left, and what were their condition, and whether any improvements have been made on the land since Jones left, by you, or for you?—were not improper, since answers to them might tend to show the value of the property, an important inquiry, in one phase of the case. The answer to the last question—“A right smart improvements have been made in clearing and fencing”—was a mere conclusion of facts, an inference necessarily involving facts as to the quantity of land cleared and fenced, which, as a collective fact, was properly allowable, subject to the cross-examination of the plaintiff, if he desired the matter stated more explicitly or in detail: *South etc. R. R. Co. v. McLendon*, 63 Ala. 276; *Hood v. Disston*, 90 Ala. 379.

Besides, a sufficient answer to all these exceptions is, that if material, they could not have influenced a jury in any way, since the court gave the general charge for the defendant, thereby withdrawing from the jury all consideration of the facts, except as to their belief of them, there being no conflict in the evidence: 1 Greenleaf on Evidence, sec. 52.

3. There was no error in refusing to allow plaintiff to ask defendant, on her cross-examination, "If Jones' wife was on good terms with him when he left, and if she went with him?" Answer to the question was irrelevant to the principal fact or matter in dispute.

4. The declaration of claim of exemption, made and filed in the office of the judge of probate of Cullman county, in this state, was made and recorded in accordance with the statutes on the subject, and was relevant, since the statute makes it, thereafter, *prima facie* correct, and operative as notice of its contents: Code, secs. 2507, 2515, 2517, 2537.

The statute makes the certified copy of such proceedings ³⁴⁶ (and these were properly certified) have the same effect as if the originals were produced and proved. But, in addition to the certified transcript, the defendant introduced, proved, and read the original minute entries of this proceeding from the record book of the probate court, to which the plaintiff also objected. But these objections were properly overruled, since either was sufficient: Code, sec. 2488; *Stevenson v. Moody*, 85 Ala. 35.

5. A transcript of the proceedings in the probate court of Cullman county, duly certified, by which defendant claimed to have been adopted as the child of Robert Jones, was offered, and read in evidence against the objection of the plaintiff. The proceedings were in close and satisfactory compliance with the statutory mode for the adoption of a child: Code, sec. 2367; *Abney v. De Loach*, 84 Ala. 393. The defendant also proved and read in evidence the original minute entry of said proceeding, from the record book from the probate court of said county. The transcript of the entry, or the original entry itself, was admissible: Authorities, *supra*.

6. The act of adoption of a child has been defined to be "one by which a person takes the child of another into his family and treats it as his own": 1 Am. & Eng. Ency. of Law, 204. "To receive or treat as a son or daughter one who is the child of another": Worcester's Dictionary. "To take

into one's family as a son or heir; to take and treat as a child, giving a title to the privileges and rights of a child": Webster's Dictionary; *Tilley v. Harrison*, 91 Ala. 295; *Russell v. Russell*, 84 Ala. 48.

Our statute on the subject is: "Any person desirous to adopt a child, so as to make it capable of inheriting his estate, real and personal, or to change the name of one previously adopted, may make a declaration in writing, attested by two witnesses, . . . which, being acknowledged by the declarant before the judge of probate of the county of his residence, . . . has the effect to make such child capable of inheriting such estate of the declarant, and of changing its name to the one in the declaration."

The primary object of the statute would seem to be to allow any person to adopt the child of another, and make it capable of inheriting his estate, if he should die intestate, or to change the name of one previously adopted. But a liberal interpretation and operation should be given to the statute. Accordingly, we held on this subject, in another connection, that "though adoption may not, by operation of the statute, originate and establish all the legal consequences and incidents ³⁴⁷ of the natural relation of parent and child, when the adoptive father declares his own name as the name by which he wishes the child to be thereafter known, and takes it into his family to be treated as a child, he assumes the duties of a natural parent, and is entitled to its custody and services, or earnings, as against all persons, unless, it may be, the true parents, when they have not consented to the adoption": *Tilley v. Harrison*, 91 Ala. 297. And so our homestead exemption, deemed so important as to be made the subject of constitutional and legislative provision, is one in favor of the family, is founded in a spirit of humanity and benevolence, and the statutes on the subject, like the one providing for the adoption of a minor are to be liberally construed: 3 Brickell's Digest, 490, sec. 2; Thompson on Homesteads, secs. 47, 131. Applying such construction to our homestead and exemption laws, we hold that an adopted child, as a natural one, is entitled, during minority, to this claim of exemption.

7. The judgment in this case is one of exemption to the defendant "so long as said Mary J. Scroggins remains a *bona fide* resident of the state of Alabama," etc. The statute (Code, section 2507), and the constitution (article 10, section 33),

limit the exemption as to children during their minority. The judgment entry, no doubt, followed section 2537 of the code—making provision for exemption in favor of children when the father absconds or abandons his family, as was the case here—which provides that “such exemptions shall continue only so long as the wife and minor child or children, or either, shall remain *bona fide* residents of this state.” But this section must be construed *in pari materia* with said section 2507, and said article of the constitution, and clearly means that the exemption is to be enjoyed by the children, during minority only, if they remain *bona fide* residents for that length of time: *Miller v. Marx*, 55 Ala. 322; *Hunter v. Law*, 68 Ala. 365; *Barber v. Williams*, 74 Ala. 333; *Norton v. Norton*, 94 Ala. 481. The judgment will be, here, so corrected, and, as corrected, affirmed.

Affirmed.

ADOPTION—WHAT CONSTITUTES.—Adoption is the act by which relations of paternity and affiliation are recognized as legally existing between persons not so related by nature: *Morrison v. Estate of Sessions*, 70 Mich. 297; 14 Am. St. Rep. 500. The subject of adoption will be found discussed at length in *Van Matre v. Sankey*, 148 Ill. 536, *post*, 196, and extended note.

ADOPTION—CONSTRUCTION OF STATUTES.—The right of adoption being in derogation of the common law is a special privilege conferred by statute, and the rule is that such statutes must be strictly construed: *Ferguson v. Jones*, 17 Or. 204; 11 Am. St. Rep. 808. In order to effect an adoption, there must be a substantial compliance with all of the essential requirements of the statute: *Estate of Johnson*, 98 Cal 531.

AIKEN v. STEINER.

[98 ALABAMA, 355.]

EXEMPTION.—PARTNERS cannot, during the existence of the partnership, claim an individual exemption in partnership property taken under legal process for partnership debts.

EXEMPTION OF PARTNERSHIP PROPERTY.—A sale of partnership property by one partner to the other cannot entitle the purchasing partner to retain the property as exempt from execution for the partnership debts. To so hold would be to sustain a transfer which must necessarily result in delaying, hindering, and defrauding partnership creditors.

Thomas H. Watts and M. N. Carlisle, for the appellant.

Gardner and Wiley, for appellee.

356 COLEMAN, J. The facts in the case are agreed upon, and present but one question for our consideration.

The partnership assets of a firm composed of two members are of less value than one thousand dollars, and the members of the firm own no other property. One member, who is insolvent, sells out for a cash consideration his entire interest in the partnership to his copartner. Can the purchasing partner hold the property under the exemption laws, against a creditor of the partnership?

Creditors of a partnership have no claim to, or lien upon, partnership property, but the partners themselves have such a lien upon partnership effects, for the payment of partnership debts, and, so long as the partnership exists, this right of each partner may be made available to the creditors of the firm, upon the principle of subrogation: *Reese v. Bradford*, 13 Ala. 837.

It is clearly settled as to the law of this state that partners cannot, during the existence of the partnership, claim an individual exemption in partnership property, when taken under legal process for partnership debts: *Giovanni v. First Nat. Bank*, 55 Ala. 305; 28 Am. Rep. 723; *Schlapback v. Long*, 90 Ala. 525; *Terrell v. Hurst*, 76 Ala. 588; *Levy v. Williams*, 79 Ala. 171.

The exemption laws were made for the benefit of individuals, and not for the benefit of partners as such. So long as the partnership existed, neither the partnership nor the individual members of the firm were entitled to claim any part of the assets, as exempt from partnership debts.

Under the facts of the case, the selling partner was insolvent, the purchasing partner owning no property, except that which had constituted the assets of the firm, with outstanding partnership liabilities unprovided for, the law conclusively presumes that the parties knew the effect of their transaction would be to hinder, delay, and defraud the partnership³⁵⁷ creditors. A sale by the partnership to a third party, for a cash consideration with such notice, would be declared fraudulent and void. Upon what principle of equity or of sound reasoning can it be held, that the partners cannot make a valid sale to a third party so as to defeat their firm creditors, yet the creditors may be defeated by a sale under the same circumstances by one partner to his copartner? Neither party owns any individual interest in partnership property, except such as remains after payment of all partnership debts. We are of opinion, and declare the law to be, that any disposition of property for a present consideration,

which was liable to a debt then existing, made to hinder, delay, or defraud the creditor, all the parties to the transaction having knowledge of, and participating in, the fraudulent purpose, is fraudulent and void as to such creditor, whether between individuals or a partnership to a third party, or between the partners themselves, and the exemption laws furnish no protection to the grantee under such circumstances. It cannot be the law that property which is subject to legal process may become exempt property, by a fraudulent sale, entered into by the seller and purchaser for the express purpose of defrauding the creditor, the purchaser benefiting the fraudulent debtor by a cash payment which cannot be reached by the creditor, and the purchaser, who was also a debtor, secure such benefit to himself. The precise question has not been decided by this court, but in a number of decisions it is declared, "One partner may sell to his copartner, and if the sale is fair, it will vest the exclusive title in his copartner": *Reese v. Bradford*, 13 Ala. 847. "In such case, if the sale is fair—no fraud intended—an exception may be claimed": *Levy v. Williams*, 79 Ala. 171. "It is lawful for the partners, in case of dissolution by consent, to agree that the partnership property shall belong to one of them; and if the same is *bona fide*, and for a valuable consideration, it will transfer the property to such partners, free from the claims of joint creditors": *Mayer v. Clark*, 40 Ala. 270. "Partnership property may be in good faith and before execution conveyed into separate property, and an exemption may then be claimed in it by the partner whose property it becomes": 17 Am. & Eng. Ency. of Law, 1336.

The rights of partners as between themselves, and the equity of partnership creditors was elaborately considered in the case of *Arnold v. Hagerman*, 45 N. J. Eq. 186, 14 Am. St. Rep. 712, and the conclusions of the court on the question under consideration were as follows: "Generally speaking, this equity ³⁵⁸ of creditors continues only so long as the rights of the partners against each other subsist; but if the partners have put an end to their rights with intent to hinder, delay, or defraud the partnership creditors in pursuit of this equity, then this equity of creditors may still remain." "If a firm and all its members be insolvent, and the insolvency be patent to all the members, a transfer of the partnership property to one of the firm will be considered as made with intent to

hinder, delay, or defraud the firm creditors." These are sound, wholesome principles, and accord with our views. It is upon such principles only that partnership affairs can be properly administered and settled with justice to partnership creditors.

Upon the agreed facts, the court properly instructed the jury, at the written request of the plaintiff, to find the issue in his favor.

Affirmed.

EXECUTION—EXEMPTION OF PARTNERSHIP PROPERTY.—Partners are not entitled to have any of the partnership property set aside as exempt from execution: *Thurlow v. Warren*, 82 Me. 164; 17 Am. St. Rep. 472, and note; *Cowan v. Creditors*, 77 Cal. 403; 11 Am. St. Rep. 294, and note with the cases collected. The statutory right of exemption is an individual right, which one partner may enforce in a separate suit as an individual: *McCoy v. Brennan*, 61 Mich. 362; 1 Am. St. Rep. 589, and extended note.

BUTLER v. WALKER.

[96 ALABAMA, 353.]

MUNICIPAL CORPORATIONS—CONDITIONS SUBSEQUENT—FORFEITURE OF CHARTER.—If the charter of a municipality declares that on the failure to hold the annual elections on a day mentioned in such charter all the powers, rights, and privileges conferred on the municipality as a corporation shall forever cease and determine and be in no force and effect whatever this is a sufficient legislative determination and declaration of dissolution, and of itself, on the happening of the condition, works the corporate destruction.

A MUNICIPAL CORPORATION DOES NOT FORFEIT ITS CHARTER BY NON-USER for any period of time. To work such forfeiture there must be legislative action by a repeal of the act of incorporation or judicial action adjudging the forfeiture, unless the legislature, in its act of incorporation or otherwise, declares that, upon the happening of a certain contingency, the corporation shall cease, and such contingency has taken place.

MUNICIPAL CORPORATIONS—PROCEEDINGS TO INCORPORATE A TOWN ALREADY INCORPORATED.—Proceedings before the probate judge for the incorporation of a town are void if it has already been incorporated and its charter has not been forfeited. Nor can these proceedings be sustained on proof that there had been no user of the charter for many years, and the incorporators believed such nonuser had forfeited the corporate rights and terminated the corporate existence.

OFFICERS DE FACTO.—If, in the belief that a municipal charter has been forfeited for nonuser, proceedings are taken for the reincorporation of the municipality which are void because of the pre-existing incorporation, and the officers provided for in the new and the old charters are

the same, as also are the duties of their offices, officers elected under proceedings prosecuted in the manner authorized by the new charter, and who took and exercised the duties of their offices in the mistaken belief that they had been elected and were acting under the second charter, are nevertheless *de facto* officers of *de jure* offices, and all their acts as between the corporation and the public or third persons, in their official capacity, are valid for all purposes, and to the same extent as if they had been chosen at elections held under the original organization of the municipality.

OFFICERS DE JURE.—If an election is ordered by *de facto* officers to be held, and is held, in conformity with the law, the persons elected thereat become officers *de jure*, and their title cannot be assailed on the ground that the officers ordering such election were not themselves officers *de jure*.

Gamble and Bricken, for the appellants.

I. H. Parks, for the appellee.

³⁵⁹ **McCLELLAN, J.** The propositions that a municipal charter is not forfeited by nonuser for any period of time, and that to this end there must be legislative action by repeal of the act of incorporation, or judicial action adjudging forfeiture, may be conceded for all the purposes of this case to be thoroughly established; indeed, we entertain no doubt of their soundness. But it is equally clear, we think, that the legislature having plenary power in the premises, may create such corporations conditionally, that is, make provision for corporate existence upon a vote of the people within the territorial limits of the proposed corporation accepting the franchises, privileges, and immunities granted in the act; and also, as a corollary to this power, to prescribe a condition precedent, the charter act may provide a condition subsequent to continued corporate existence, or even may absolutely limit the duration of the corporation it creates. In either of which cases the provision is no more than a precedent legislative determination and declaration of forfeiture or surrender of corporate existence at a certain time, or upon the happening of a certain event, and is, to our minds, as efficacious to the destruction of corporate entity as would be contemporaneous legislative abrogation of the charter. We are, therefore, of the opinion, that it was entirely within legislative competency to make provision in the act of March 8, 1871, chartering the town of Rutledge, for the dissolution of the corporation upon an event therein ³⁶⁰ specified, and that the clause of that act, which is in this language: "If there should be a failure to hold the annual

elections for intendant and councilmen on the day mentioned in this act for that purpose, then all the powers, rights, privileges, immunities, and franchises hereinbefore or hereinafter conferred on the said intendant and council, as a corporation, shall forever cease and determine, and be of no force and effect whatever," is a sufficient legislative determination and declaration of dissolution, in and of itself working corporate destruction, *ipso facto*, on the happening of the condition upon which it was intended to become operative. That the condition did transpire—that there was a failure to hold the annual election—within a year or two after the original organization of the municipality under the act, and for each year since that time, is admitted in this case; and we feel safe in the conclusion that this failure of the corporation to comply with the organic law of its existence entailed upon it the destructive consequences prescribed by that law, and that the town of Rutledge thereupon became as if it had never been erected into an incorporation at all. There was therefore no legal impediment to the subsequent incorporation of the town of Rutledge under the general law then embodied in the code of 1876, sections 1763–1802, as amended by acts passed in 1879 and 1881, and now with these amendments constituting sections 1486 et seq. of the code of 1886; and the town was in fact duly and regularly incorporated under that law in the latter part of the year 1881. There is no provision for forfeiture of incorporation for nonuser or other cause in the general law; there has been no legislative declaration of forfeiture, and no judicial dissolution of that corporation since then. On the principles stated in the outset of this opinion, and to the soundness of which counsel upon either hand subscribe, that corporate entity has existed at every moment of time since the decree of the probate judge to that end was rendered and it exists to-day, notwithstanding organization under it which was regularly perfected upon the passing of the decree, was not kept up, the fact being, the officers elected for the year 1883, after entering upon the discharge of their duties, and discharging them for a time, ceased so to do before the expiration of their terms, and afterwards, for several years, no elections were held. It may be said to be axiomatic, that two distinct charters for one corporation cannot exist at the same time, and, of consequence, that a corporation already

in existence, and having a valid charter, cannot be reincorporated through proceedings before the judge of probate, ³⁶¹ who has no authority to repeal, annul, or declare forfeited an existing charter, but whose powers are, to the contrary, expressly limited to the incorporation of the inhabitants of a town "not incorporated": Code 1876, sec. 1763; Code 1886, sec. 1486. It follows, of course, that the efforts of the inhabitants of Rutledge to reincorporate the town by proceedings before the probate judge in 1888, and again in 1891, on the mistaken idea that the nonuser after the incorporation of 1881 had forfeited corporate existence, were entirely abortive, the orders and decrees of the judge of probate in that behalf were utterly void, and all that was done, ordered, and decreed in those connections is now to be taken as if no such efforts had ever been made, and as if no such orders or decrees had ever in fact been entered. Yet under the supposed new incorporation of 1891—as also under that of 1888—an election was held by the sheriff, as provided in section 1493 of the present code, for an intendant and five councilmen, and the persons elected were inducted into office, and discharged the duties thereof for the term prescribed by the statute. At the end of this term these persons thus in fact constituting the intendant and council of the town, and performing all corporate functions incident to these positions, ordered, we feel warranted in assuming from the pleadings and agreed facts in this record, an election for the selection of an intendant and five councilmen for the ensuing year, and at this election were chosen the respondents to this petition, who thereupon qualified and entered upon the discharge of their duties. The present proceeding is in one aspect in the nature of an information for *quo warranto*, and seeks to have the respondents adjudged usurpers of the office they now assume to occupy and ousted therefrom; in another aspect it is more in the nature of an application for *certiorari* than any thing else, and seeks to have certain ordinances enacted by the respondents declared void and expunged. It is very clear to us that the petition is bad for duplicity, if for no other reason, but we need not discuss that point. This we pretermit because it is equally clear that there is no merit in the case presented by petitioners in either aspect, or in both combined, conceding they admitted of combination. The corporation as brought into existence by the proceedings

before the probate judge in 1881 has, as we have indicated, been ever since then an existing *de jure* corporation, and is so now, notwithstanding there have, in the interim, been two periods of time during which there was no municipal organization, and the functions of the corporation were not exercised. As a necessary incident to ³⁶² this continued corporate existence, or rather as an essential and inherent part of it, there have also existed during all that time the offices in the corporation created by the statute, and designated as one intendant and five councilmen, and these offices are the same in all respects—the statutes in this regard being identical at the times of the original valid incorporation and the subsequent attempted reincorporation—under the incorporation of 1881, which still exists, as they were supposed to be under the void incorporations of 1888 and 1891. These *de jure* offices were irregularly filled by an election held by the sheriff in 1891, and the persons then elected entered upon and discharged the duties incident thereto under the color of right afforded by the proceedings of that year before the probate judge. These duties were the same and in like manner discharged as they would have been and would have been performed had there been no attempted reincorporation. The only point of difference lies in the fact that the incumbents erroneously referred their titles to the void proceeding of 1891, instead of the valid and still subsisting charter of 1881. The only real infirmity in that title resulted from the irregularity with respect to the election of 1891, in that it was called and held by the sheriff under section 1493, instead of by their predecessors in office, under section 1495 of the code. This irregularity cannot have the effect of impugning the validity of the acts done by these persons, which were within the competency of the intendant and councilmen of the town. The offices were those prescribed by the valid charter of 1881. Their functions were those prescribed by that charter. They had no existence save by virtue of that charter. The law refers the title of the incumbents to that charter. They were clearly *de jure* offices. They were filled by persons claiming to have been elected to them, and to be the intendant and councilmen of the town of Rutledge, which they could only be by the force of that charter, and who as such, unchallenged, carried on the government of the municipality. There can be no question, we think, but that these men, not-

withstanding the irregularity of their election, were in every sense *de facto* incumbents of *de jure* offices, and that their acts, as between the corporation and the public, or third persons, in their official capacities, are as valid for all purposes as had they been regular successors, through regular elections duly ordered and held, of the intendant and council chosen upon the original organization of the municipality in 1881: 1 Dillon on Municipal Corporations, secs. 221 n., 256 n., 276, and authorities cited; *People v. Bartlett*, 6 Wend. 422; ³⁶³ *Lynch v. Lafland*, 4 Cold. 96; *Norton v. Shelby County*, 118 U. S. 425; 2 Brickell's Digest, p. 289, secs. 18 et seq.; 3 Brickell's Digest, p. 681, secs. 14 et seq.; *Floyd v. State*, 79 Ala. 39, and authorities cited.

Among the official acts done by these *de facto* officers was the ordering of an election for the selection of their successors in office as prescribed by the statute, and as the same would have been ordered had there been no lapse in corporate organization. This act and the election held under it were regular and valid. At this election the present respondents were chosen to be intendant and councilmen of the town of Rutledge. Under the principles we have stated, there can be no impeachment of this election or of the title of those chosen thereat to the offices in question. That title is referable to the charter of 1881, through this election ordered and held as required by that charter. They are *de jure* incumbents of *de jure* offices; and the circuit court properly dismissed the petition which sought, on the facts we have adverted to, to oust them of their offices, and have their acts while in office annulled.

Affirmed.

OFFICERS DE FACTO—WHO ARE AND VALIDITY OF ACTS OF.—These questions will be found fully treated in *Weatherford v. State*, 31 Tex. Crim. Rep. 530; 37 Am. St. Rep. 828, and note with the cases collected.

GORE v. DICKINSON.

[98 ALABAMA, 363.]

PARTITION OF LANDS ADVERSELY HELD may be made by a court of equity if the complainant has an immediate right of entry, but the probate or chancery court, in the exercise of a statutory jurisdiction to sell land for distribution or equitable division, cannot proceed if such lands are adversely held.

PARTITION.—THE FACT THAT INCONVENIENCE AND INJURY WILL RESULT, or mischief be entailed by a partition, or that a division may be embarrassed by difficulties, cannot deprive a cotenant of his right to partition.

PARTITION MAY BE DECREED WHETHER THE TITLE IS LEGAL OR EQUITABLE.

A DEED, UNTIL DELIVERED, does not take effect.

PARTITION—ADJUSTING EQUITIES.—If a court obtains jurisdiction in a suit for partition it will ascertain the validity and extent of conveyances made by the parties, and so mould its decree as to meet all equities growing out of their ownership of, and relation to, the property.

PARTITION.—JURISDICTION TO MAKE PARTITION IS NOT OUSTED by an allegation in the complaint showing that there are conflicting claims of title, or that the property is adversely held, nor by an allegation that the common ancestor of the parties had made a conveyance which was invalid for want of delivery, and a prayer that such deed be canceled.

A SUIT FOR PARTITION SHOULD EMBRACE ALL THE LANDS OF THE COTENANTS, and if one of them has mortgaged a part of such lands, the others cannot, by their bill of partition, compel him to compensate them for their interest in the property so mortgaged. The mortgage did not affect the interest of the cotenants not parties to it, and the petition should therefore have included the lands mortgaged.

Savage and Coleman, for the appellants.

S. D. G. Brothers, for the appellee.

365 THORINGTON, J. Appellants and appellees are the heirs at law of John Dickinson, deceased, and the bill is filed by the former against the latter for the purpose of obtaining partition of certain lands described in the bill, of which, it is alleged, their said ancestor died seised and possessed.

The essential facts, according to the averments of the bill, are that the tract of land in question consisted, at the death of the common ancestor, of about eight hundred and forty acres, situated in Calhoun county, and in 1867 he and his wife executed a deed, embracing all the property, in favor of the appellees, J. A. Dickinson and E. B. Dickinson, on a recited consideration of several thousand dollars. That no consideration was paid, and that the instrument was not intended to operate as a conveyance of said lands, and it was understood that no title should pass, but that the property

should continue to be the property of the grantor, and that the conveyance was never accepted by J. A. and E. B. Dickinson; the grantor, John Dickinson, as averred in the bill, remained in possession of the land, claiming and cultivating it as his own; that his possession was open, notorious, and uninterrupted, and with the full knowledge of J. A. and E. B. Dickinson, and so continued up to the time of his death, ³⁶⁶ in 1883. John A. and E. B. at no time disputed his title or possession, or set up any claim to the property.

In December, 1886, E. B. Dickinson conveyed to J. A. Dickinson and William Burris (husband of one of the appellants) an undivided three-fifths interest in a portion of the above-mentioned lands, which particular portion is described in the bill. On April 10, 1886, J. A. Dickinson made a deed to E. B. Dickinson, purporting to convey the entire tract of land first herein mentioned.

On the eighteenth day of May, 1887, E. B. Dickinson also conveyed to Mary L. Gore, one of the complainants, and her husband, W. W. Gore, an undivided one-fifth interest in the same lands embraced in his deed to J. A. Dickinson and William Burris, and on April 28, 1890, E. B. Dickinson mortgaged to a loan company a certain other portion of the lands particularly described in the bill, to secure the sum of one thousand and twenty-one dollars and twenty-one cents, which he received on said mortgage security.

The bill further alleges that the entire tract of land, on the death of John Dickinson, in 1883, descended to his heirs, the parties to this suit, each being entitled to one-fifth interest, except Emma Oswalt, Margaret J. Gassett, William W. Wells, and Peter E. Wells, who represent the interest of their deceased mother. While the death of the latter is not distinctly averred, it is implied in the statement that appellants and appellees constitute all the living heirs of John Dickinson, deceased.

It is claimed in the bill that E. B. Dickinson had received "his full share of said land by the money he has received under the mortgage above stated, and is not entitled to any share in the balance," and that the deed made by E. B. Dickinson to J. A. Dickinson and William Burris, in December, 1886, was made with notice to the grantees that the lands therein conveyed were the joint property of the heirs of John Dickinson, and that the deed was intended as a partial settlement of the claims of the heirs, and no consideration was,

in fact, paid; but in what manner it was intended as a settlement is not stated.

It is also averred that the deed from E. B. Dickinson to W. W. Gore and wife was executed "under similar circumstances," and that Gore and wife never accepted said conveyance.

The prayer of the bill is for a cancellation of all the deeds mentioned in the bill, including the deed from E. B. Dickinson to Mary L. Gore, one of the complainants, and her husband; that all the lands, except the part mortgaged by E. B. Dickinson to the loan company, may be partitioned between ³⁶⁷ the parties to the bill, according to their several interests as stated herein; that E. B. Dickinson be required to "compensate the other heirs for their interest in the land he has mortgaged," and there is a prayer for general relief.

The defendants filed a motion to dismiss the bill for the want of equity, and also demurred on grounds which will hereinafter be noticed.

The chancery court sustained the demurrers and motion to dismiss, and from the decree the appeal is taken.

According to the decisions of this court, the chancery court, like the probate court in the exercise of the statutory jurisdiction to sell land for distribution, or equitable division, is without authority to decree a sale of lands that are adversely held; but the jurisdiction of a court of equity to decree partition of lands, if the complainant has an immediate right of entry, is not ousted by the mere circumstance of an adverse possession for any period less than ten years. In the case of *McMath v. De Bardelaben*, 75 Ala. 68, it is said: "The court has full power to avail itself of the aid of a jury. . . . The very purpose of the statute is the enlargement of the jurisdiction of the court, rendering the remedy more efficacious and complete. If, upon the face of the bill, the fact of the adverse possession of the defendant had not been disclosed, if it had been first made apparent by the answer of the defendant, pleading or averring it in opposition to, or denial of, the title of the complainant, there can be no ground for saying that it would have affected the jurisdiction. The statute could "not have been obeyed, unless the court had entertained jurisdiction, calling in, if necessary, the aid of a jury. That the fact appears from the face of the bill is not material; the jurisdiction of the court is plenary for the determination of its effect." And in *Berry v. Webb*, 77 Ala. 507, it is said: "We

entertain no doubt of the jurisdiction of the court to grant the relief prayed, notwithstanding the fact that the complainant is shown to have been out of possession for many years prior to the filing of the bill, and the defendant . . . in possession, holding adversely for a period of time less than ten years, so that her title had not become perfect under the influence of the statute of limitations": Code, sec. 3588; Freeman on Cotenancy and Partition, secs. 449, 450; *McQueen v. Turner*, 91 Ala. 273.

So, also, it is settled that neither the fact that inconvenience or injury will result, or mischief be entailed upon the property, or that a division may be embarrassed by difficulties, ³⁶⁸ will deprive a cotenant of the right to demand a partition of the common property.

It is a matter of right, and may be decreed by a court of equity whether the title of the parties be legal or equitable, the practice, generally, being to refer the decision of a disputed legal title to a jury, but, when an equitable title is involved, the whole question is for the decision of the court: *Dennor v. Quartermas*, 90 Ala. 164; 24 Am. St. Rep. 778; *Berry v. Webb*, 77 Ala. 507.

And the court having acquired jurisdiction of the subject matter on a special and original ground of equity, "it will employ its powers to adjust the equities between the parties, growing out of their ownership of and relation to the property, and the connection of their interests with these of their cotenants, and with the general right or equity of the complainant": *Marshall v. Marshall*, 86 Ala. 383.

If the averments of appellants' bill are true, as we must assume on demurrer, and motion to dismiss the bill for the want of equity, the deed alleged to have been made by John Dickinson (the common ancestor through whom all the parties claim title) to John A. Dickinson and E. B. Dickinson, in 1867, was inoperative and void for the want of delivery and acceptance. Delivery is indispensable to the valid execution of a deed, and it is only from the delivery that it takes effect and becomes an irrevocable conveyance: 3 Brickell's Digest, sec. 25, p. 298.

Had that deed, however, been effectual to pass title to the property from John Dickinson, such title, according to the averments of the bill, was divested by the adverse possession and claim of John Dickinson, with the knowledge of John A. and E. B. Dickinson, from 1867, the date of the deed, until

the death of John Dickinson, in 1883, and, consequently, he died seised and possessed of the land. Upon his death the title devolved upon such of the parties to the bill as were his heirs at law, each being vested with an undivided one-fifth interest, except the children of Mrs. Wells, who, together, represent the one-fifth interest of their deceased mother.

That subsequent to the death of John Dickinson, and the devolution of the title upon the heirs, as above shown, some of the cotenants have executed conveyances among themselves to portions of the property, or that adverse possessions have arisen which have not continued a sufficient length of time to perfect the statutory bar, cannot deprive the complainants, as we have shown, of their right to demand a partition of the common property.

369 The court having acquired jurisdiction of the main question—the real subject matter—it will ascertain the validity and extent of such conveyances, and so mould and adjust its decree as to meet all the equities of the parties growing out of their ownership of, and relation to, the property: 17 Am. & Eng. Ency. of Law, 754, 755.

The prime object of the bill is to obtain partition of the property, and the cancellation of the deeds mentioned in the bill, as clouds upon the title is only incidental, and designed to make the partition more effective. All the conveyances sought to be canceled are made by and to some of the cotenants, simply having the effect to change their relation to the common property, or specific portions thereof, and which the court can adjust in connection with the general right or equity of the complainants: *Marshall v. Marshall*, 86 Ala. 383.

The bill being for partition, and the conveyance sought to be canceled, as a cloud on the title, being of the nature above set forth, it was not necessary that the bill should contain an averment that complainants were in possession of the property, as it would have been had the removal of the cloud been the sole ground of equity. The authorities cited by appellant's counsel apply to a bill of the latter kind, but not to a bill for partition.

The demurrers on this ground, and also on the ground that the bill shows the property is held adversely to complainants, should not have been sustained.

The grounds of demurrer that complainants have an

adequate remedy at law, and that the bill seeks to try the title to the property, were also improperly sustained.

In all suits for partition, the title, whether legal or equitable, is, to some extent, drawn in question, either directly or indirectly. The jurisdiction, if the title be legal, is concurrent with that of courts of law, and until the jurisdiction of the latter has been put in exercise, the court of equity will intervene, though no special cause of intervention may be shown. If a question arises involving the equitable title the court of equity decides it, the recognition and enforcement of such a title being peculiarly and exclusively within the province of that court.

If the question is one of fact, it will not oust or exclude jurisdiction, but is merely cause for directing the issues of fact to be determined in a court of law, and that proceedings be stayed until they are determined. These principles are declared in the case of *McMath v. De Bardelaben*, 75 Ala. 68.

The only remaining grounds of demurrer are that the ³⁷⁰ bill seeks to set up a secret or resulting trust in John Dickinson, by contesting the validity of his deed; and that the bill seeks to establish such a trust by contradicting the recitals of said deed.

These grounds of demurrer cannot prevail, for the reason that they are based upon a misapprehension of the bill; it does not seek to enforce a secret or resulting trust, but claims that the deed never became operative as a conveyance, for the want of delivery, and also that, conceding it to have been a valid conveyance, the title to the property was afterwards reacquired by John Dickinson, by adverse possession.

These two grounds of demurrer should also have been overruled.

There is a defect, however, not covered by the demurrers, which it is proper for us to notice. The bill seeks partition of only part of the land, viz: That part not covered by E. B. Dickinson's mortgage to the trust company, and to compel him to compensate his cotenants for their interest in the property so mortgaged by him. There is no principle of equity which would authorize complainants to treat the mortgage as a sale of the lands mortgaged, and to ask the court to compel their cotenant, John A. Dickinson, one of the defendants, so to elect, and to compel E. B. Dickinson, the mortgagor, to compensate them "for their interest in the lands he has mortgaged."

This mortgage conveyed no title to the lands embraced in it, except such as E. B. Dickinson himself had; it did not convey or affect complainants' title or rights; they have nothing to do with it, but in the event of partition the statute takes care of it.

The bill should have sought a partition of the entire tract of land, including that mortgaged by E. B. Dickinson, and upon such partition the mortgage, by virtue of the statute, thenceforth would be a charge only on the share assigned to E. B. Dickinson, the mortgagor, such share being first charged with its due proportion of the costs of the partition: Code 1886, sec. 3247; 17 Am. & Eng. Ency. of Law, 752.

The bill having equity in so far as it seeks partition, and no objection having been raised by demurrer to that part of the bill which seeks to have E. B. Dickinson compensate his cotenants for their interest in the property mortgaged to the loan company, it was error to dismiss the bill for the want of equity, and the decree of the chancery court must be reversed and the cause remanded, when the bill may be amended to conform to this opinion.

Reversed and remanded. —

PARTITION OF LANDS HELD ADVERSELY.—See the note to *Weston v. Stoddard*, 33 Am. St. Rep. 703, and the extended note to *Nichols v. Nichols*, 67 Am. Dec. 704, 707. Adverse possession amounting to an actual ouster must be shown to defeat an action for partition: *Colvin v. Hauenstein*, 110 Mo. 575. Whenever the plaintiff in a partition suit shows himself seised of the requisite title he is entitled to a decree, whether the land is held or claimed adversely to him or not: *Bouham v. Weymouth*, 39 Minn. 92.

PARTITION—EQUITABLE TITLE.—An action for partition may be maintained by the owner of an equitable title: *Watson v. Sutro*, 86 Cal. 501. See further on this subject the extended note to *Nichols v. Nichols*, 66 Am. Dec. 709.

PARTITION—COTENANT'S RIGHT TO.—Every cotenant is entitled to demand partition, though it may be inconvenient, injurious, or even ruinous to one or more of the parties in interest: *Donnor v. Quartermas*, 90 Ala. 164; 24 Am. St. Rep. 778; *Campbell v. Lowe*, 9 Md. 500; 66 Am. Dec. 339; *Hanson v. Willard*, 12 Me. 142; 28 Am. Dec. 162.

DEEDS—NECESSITY FOR DELIVERY.—The delivery of a deed is essential to its operation: *Weber v. Christen*, 121 Ill. 91; 2 Am. St. Rep. 68, and note; *Porter v. Woodhouse*, 59 Conn. 568; 21 Am. St. Rep. 131, and note; *Wood v. Ingraham*, 3 Strob. Eq. 105; 51 Am. Dec. 671; *Van Amringe v. Morton*, 4 Whart. 382; 34 Am. Dec. 517, and note; *Church v. Gilman*, 15 Wend. 656; 30 Am. Dec. 82, and note; *Hughes v. Easten*, 4 J. J. Marsh. 572; 20 Am. Dec. 230; *Price v. Hudson*, 125 Ill. 284; *Hall v. Hall*, 107 Mo. 101.

SOUTH AND NORTH ALABAMA R. R. CO. v. HIGHLAND AVENUE AND BELT R. R. CO.

[98 ALABAMA, 400.]

SPECIFIC PERFORMANCE—INADEQUACY OF CONSIDERATION AS A DEFENSE.—

Mere inadequacy of consideration or value is not in itself a sufficient reason to refuse to specifically enforce a contract. Whether the bargains of persons competent to deal with their own affairs are wise or unwise are considerations not for courts of justice, but for the parties themselves to deliberate upon.

SPECIFIC PERFORMANCE—MUTUALITY, WANT OF.—Though a contract is not binding upon one of the parties when it is executed, yet, if it gives him an option to accept its terms, he may, by suit or otherwise, waive the want of mutuality, and enforce specific performance of the contract. Therefore, if one railway corporation agrees that another may construct its tracks across the right of way of the former, upon specified conditions, the contract will not be refused specific performance for want of mutuality if the corporation has accepted, or sought to accept, the contract in its favor, and to compel the other corporation to submit to the construction of the tracks as agreed upon.

SPECIFIC PERFORMANCE.—IF A CONTRACT IMPLIES THE PERFORMANCE OF PERSONAL SERVICES requiring special skill, judgment, and discretion, a court of equity will not undertake its specific performance.

SPECIFIC PERFORMANCE—CONTRACT FOR PERSONAL SERVICES.—If railway corporation A agrees with railway corporation B that the former will permit the latter to construct and operate tracks upon the former's right of way, and to make certain crossings which the exercise of the privilege may render necessary, and in return B agrees that A may cross certain property belonging to B whenever and wherever it may elect to exercise that privilege, and to maintain proper crossings, and that on the failure to renew or repair such crossings, after thirty days' notice, that they may be renewed or repaired at its expense by the other corporation, there is not, on the part of either, such a contract for personal services as will induce a court of equity to refuse specific performance of the contract. The refusal to repair or renew the crossings as provided for in the contract would create a mere pecuniary liability.

SPECIFIC PERFORMANCE.—NOTWITHSTANDING AN ACTION AT LAW COULD BE MAINTAINED TO RECOVER DAMAGES for the refusal of one railway corporation to permit another to cross its tracks, according to the terms of an agreement between them, a court of equity will compel specific performance of the agreement, and will enjoin the defendant from preventing the use of its tracks in the manner specified in the agreement.

Hewitt, Walker, and Porter, and J. M. Falkner, for the appellant.

Alexander T. London, for the appellee.

402 **STONE, C. J.** In this opinion we will abbreviate the names, and designate the parties as the South and North

company, and the Highland and Belt company. Each is an incorporated railroad company, in active operation, and the bill in this case ⁴⁰³ was filed by the latter—the appellee—to compel the specific performance of an agreement entered into in the year 1887. The Elyton Land Company made the contract with the South and North company, but subsequently sold out its railroad enterprise and interest in the contract to the Highland Avenue and Belt Railroad Company, which instituted this suit in November, 1889. The case comes before us on appeal from a decretal order of the chancellor, overruling a demurrer to the bill as amended. The pleadings do not question the making of the contract, nor does the South and North company deny that it has failed to keep its contract. The defense it seeks to make is, that the contract is not such an one as that chancery will enforce its specific performance, for two reasons: 1. That it is not mutual, in that sense which equitably justifies its specific enforcement; and 2. That its obligations are of such a character that chancery cannot compel their performance.

The track of the South and North company extends entirely through the city of Birmingham, its general bearing being from south to north, but making considerable curves and deflections. The right of way is wide, with its main track near the center thereof. In laying out the city a broad avenue was left for railroad tracks, with a bearing from east northeast, to west southwest. In this avenue is the common passenger depot, and along it the South and North company, as well as other railroads, have their main tracks. The South and North company enters this avenue at Thirteenth street, and leaves it about Twenty-sixth street. Along the right of way of the South and North company, bounding it on the northwest, the Highland and Belt company owns a strip of land thirty-five feet wide, which commences about Twenty-fourth street, and extends westwardly, bordering the right of way of the South and North company, to or to beyond Eighteenth street, which is beyond the passenger depot. But the Highland and Belt company owns no land, or strip of land, extending eastward beyond Twenty-fourth street.

A map and submaps appear to have been made exhibit to the bill, and many references are made to them, and to marks upon them. These are not furnished with the transcript before us. True, we have a map of the plan of the city, but

it is without very many of the marks mentioned in the bill, and it is, therefore, in some respects, unintelligible to us. But, as we understand the real contention in this case, it may be thus stated: The Highland and Belt company has constructed its track, coming southwestwardly until it has reached the right of way of the South and North company at or ⁴⁰⁴ near Twenty-ninth street, and claims the right to continue the construction of its track along and over the right of way of the South and North company, until it reaches and connects with its own thirty-five feet strip, at or near Twenty-fourth street. This, as it appears, for the purpose of reaching the passenger depot from that direction. The South and North company refuses to permit it to thus lay its track on its right of way.

The part of the agreement of 1887 which this bill seeks to have specifically enforced, in what it severally requires of the two corporations, so far as it bears on the question we have stated, may be thus summarized: The South and North company granted to the Highland and Belt company the right to extend its track from a point near Twenty-ninth street, across South and North company's switch leading to Baxter Stove Works, along said right of way six and one-half feet distant from, east of, and parallel to the westwardly line of said right of way, to a point about three hundred feet east of the east line of Twenty-fourth street (the beginning of Highland and Belt company's strip), to be located on the South and North company's right of way, not exceeding two thousand four hundred feet in length. The crossing of the switch leading to Baxter Stove Works to be put in and maintained at the cost and expense of Highland and Belt company. The South and North company to have the right to cross the tracks to be constructed on its said right of way wherever and whenever it may desire to build sidings to any manufacturing establishment, warehouse, or other industrial enterprise—the cost of putting in and maintaining the crossing of such sidings with the track of the Highland and Belt company to be borne by the latter company. The contract further provided that the South and North company should have the right to cross said track of the Highland and Belt company, when necessary for convenient ingress and egress to and from said sidings that may hereafter be constructed by the South and North company to manufacturing establish-

ments, warehouses, or other industrial enterprises. It was provided that all crossings that might be made should be constructed and maintained at the cost of the Highland and Belt company. The South and North company was guaranteed preferential rights over the Highland and Belt company at all the crossings to be constructed.

In consideration of these grants and concessions, the Highland and Belt company agreed and stipulated that the several crossings above provided for and to be constructed should be constructed and maintained by it, at its exclusive cost, under the superintendence and to the satisfaction of the South and North company, which was to be the judge of when and where crossings shall need renewals and repairs. And the ⁴⁰⁵ Highland and Belt company agreed that the renewals or repairs would be made promptly; and if they failed to make them within thirty days from the time of notification from the South and North company, then the latter company should have the right to make them at the expense of the Highland and Belt company. And the Highland and Belt company granted to the South and North company the right and privilege to cross its right of way, and all tracks that were then constructed, or might thereafter be constructed thereon, south or west of Twenty-fourth street, whenever it might become necessary for the South and North company to construct switches to gain access to manufacturing establishments, warehouses, or other industrial enterprises, that then were, or might thereafter be, constructed on adjacent property.

It is contended for appellant that this contract is not just and equitable in all its parts, and that, therefore, the chancery court should not compel its specific performance, but should leave the Highland and Belt company to its action at law, for the recovery of damages for the breach of the contract by the South and North company.

It may be that the contract does not secure precisely equal benefits to the two corporations. It may be that the concessions made to the Highland and Belt company are more valuable, when viewed from the standpoint of the present time, than are the grants made by it to the South and North company. Of this, however, when the contract, as in this case, furnishes no standard or measure for estimating the relative advantages, it would be extremely hazardous for the

court to attempt a solution. Any conclusion we might reach would be the merest conjecture. We cannot be presumed to know what prospective profit the construction and maintenance of the Highland and Belt company would be to the South and North company. Nor can we know the value of the privilege of crossing the thirty-five feet strip whenever and wherever the South and North company might choose to do so, accompanied by the obligation of the Highland and Belt company to construct and maintain the crossings. These relative advantages might, and probably would, vary with changing time.

In *Waterman on Specific Performance*, section 179, is this language: "Although inadequacy of consideration in contracts of sale, either in the price or property sold, may be a ground of defense, yet the facility of contracting and the free exercise of the judgment and will of the parties require that, as a general rule, they should be sole judges of the value of the benefits to be derived from their bargains. It is, therefore, manifestly just and expedient that mere inadequacy ⁴⁰⁶ of consideration or value should not in itself be deemed by the court a sufficient reason to refuse to specifically enforce a contract, or a cause to set it aside. And such is now the rule. For courts of equity, as well as courts of law, act upon the ground that every person who is not from peculiar condition and circumstances under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise and discreet, or profitable, or unprofitable, or otherwise, are considerations, not for courts of justice, but for the party himself to deliberate upon. The reason of this is to be sought in the extreme difficulty of judging as to the feelings and motives which may have actuated the parties, and the corresponding variety of opinions which may be formed with reference to the sufficiency of the consideration." To this the author cites many authorities. And to the same effect are the following authorities, which show it is the modern, and, we may add, the more reasonable, rule: 3 *Pomeroy's Equity Jurisprudence*, sec. 1405, and notes; *Fry on Specific Performance*, sec. 275 et seq.; *Osgood v. Franklin*, 2 Johns. Ch. 1; 7 Am. Dec. 513.

It is objected to the relief prayed in this case, that there was a want of mutuality when the contract was made in this, that while the South and North company bound itself to per-

mit the Highland and Belt company to construct its track on the former's right of way, this was a mere unilateral permission, and did not bind the Highland and Belt company to so construct its track. If this were the only purpose and provision of the contract, the rule invoked would not apply. When "the contract is originally binding on the one and not on the other, the latter may by suit waive that want of mutuality, and enforce the specific performance of the contract": Fry on Specific Performance, secs. 294, 297; Waterman on Specific Performance, sec. 200; *Fallon v. Railroad Co.*, 1 Dill. 121; *Alabama etc. R. R. Co. v. South etc. R. R. Co.*, 84 Ala. 570; 5 Am. St. Rep. 401.

The contract, however, is not of the class mentioned. Each party bound itself to grant to the other a use of easement in what had been the exclusive property and right of the party granting. Each right and interest granted became the consideration for the right and benefit secured in return. There is nothing in the objection based on the alleged want of mutuality.

A graver question remains to be considered. Is the contract sought to have enforced in this case one that the chancery court will order the specific execution of, or must redress be sought in an action at law for damages? It evidently contemplates that it is to extend through a series of ⁴⁰⁷ years. Does it imply the performance of personal services, exercised with special skill, judgment, and discretion? If so, the chancery court cannot grant the relief prayed: *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498; 3 Am. St. Rep. 758; *Marble Company v. Ripley*, 10 Wall. 339; *Danforth v. Philadelphia etc. Ry. Co.*, 30 N. J. Eq. 12.

The case we have in hand does not present any of the difficulties that were encountered in the cases cited. The South and North company simply bound itself to permit the Highland and Belt company to construct and operate a track on a part of its right of way, and to make certain crossings; and the Highland and Belt company bound itself to construct and maintain all the crossings which the exercise of the privilege granted might render necessary. In return for this, the Highland and Belt company bound itself to permit the South and North company to cross its thirty-five feet strip of land, extending from Twenty-fourth to Eighteenth street, and to cross its track at other named places, "wherever and

whenever" it might elect to exercise this privilege; and it bound itself to construct and maintain the proper crossings, which might be rendered necessary if the South and North company exercised this granted privilege.

If the agreement had stopped here, possibly it would have left the Highland and Belt company under the contract obligation to personally construct and repair the necessary crossing—a service in its nature personal, "involving the exercise of personal skill, judgment, and discretion," and of indefinite duration. So interpreted, the chancery court possibly would not and could not undertake to administer and specifically enforce such contract. But the agreement did not stop there. Its provisions are, that if the Highland and Belt company, after thirty days' notice, failed to renew or repair such crossings, then the South and North company could do so at the cost and expense of the Highland and Belt company. This, upon each recurrence, could only entail a money liability, and would not impose on the chancery court the duty of retaining the case for continuous administration. The rights, duties, and liabilities of the parties being defined and settled by the decree of the court, all else would follow, as any other transaction *inter partes*, which is continuous in its nature. In what is declared above, we think we are fully sustained by the drift of modern authorities.

When a right of way is disturbed or withheld damages may be recovered in an action at law. Hence, where easements or servitudes are annexed to private estates, "the due enjoyment of them will be protected against encroachment by injunction," ⁴⁰⁸ notwithstanding an action at law could be maintained for the recovery of damages: *Lide v. Hadley*, 36 Ala. 627, 635; 76 Am. Dec. 338; 1 High on Injunctions, sec. 848; Washburn on Easements, 575.

In the case of *Lytton v. Great Northern Ry. Co.*, 2 Kay & J. 394, it was held that where a railway company had agreed with a landowner, through whose estate the railway would pass, to construct and maintain a siding connected with their railway at B., together with all necessary approaches thereto for public use, for the reception and delivery of goods, "that specific performance could be decreed of the agreement to construct the siding and approaches without decreeing the company to maintain them when made."

In *Sanderson v. Cockermouth etc. Ry. Co.*, 11 Beav. 497, a

railway company being about to sever the plaintiff's land by their railroad, agreed to purchase the necessary portion of land "subject to the making such roads, ways, and slips for cattle as might be necessary." *Held*, That although it was very difficult to execute an agreement thus expressed, yet the plaintiff was entitled to a specific performance; and that the word "necessary" must receive a reasonable interpretation.

In the great case of *Joy v. St. Louis*, 138 U. S. 1, the Wabash, St. Louis, and Pacific Railway Company had bound itself to permit the St. Louis, Kansas City, and Chicago Railroad Company to use its right of way from the north line of Forest Park, through the park to the terminus of the Wabash company's road in the city of St. Louis, for a fair and reasonable compensation. The question was whether the chancery court would specifically enforce this contract. It was ruled that the court had power to enforce the specific performance of the agreement by enjoining the appellants from preventing the Colorado company from using the right of way; and that a remedy at law would be wholly inadequate. Following this case as a precedent, it was said in *Union Pac. Ry. Co. v. Chicago etc. Ry. Co.*, 51 Fed. Rep. 309, that the specific performance of a contract, whereby one railroad lets another into the joint use of its bridge and terminals, will not be refused because the acts to be performed are numerous and complicated, and are to extend through a long term of years.

In a note to *Conger v. New York etc. R. R. Co.*, 120 N. Y. 29, 43 Am. & Eng. R. R. Cas. 643, 651, is this expression, supported by many citations: "Specific performance will be decreed to enforce contracts of a permanent nature between railroad corporations, for running on and use of each other's tracks, or of the track of one corporation by the trains of another": 409 See, also, *Chicago etc. Ry. Co. v. Union Pac. Ry. Co.*, 47 Fed. Rep. 15; 2 Chitty on Contracts, 11th Am. ed., 1429; *Wilson v. West Hartlepool Ry. Co.*, 2 De Gex, J. & S. 475.

The foregoing principles and authorities are not at war with *McBryde v. Sayre*, 86 Ala. 458; *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 489; 3 Am. St. Rep. 759; *Elyton Land Co. v. South etc. R. R. Co.*, 95 Ala. 631. Nor does it conflict when properly applied with *Windham Cotton Mfg. Co. v. Hartford etc. R. R. Co.*, 23 Conn. 373; *Cooper v. Pena*, 21 Cal. 404; *Conger v. New York etc. R. R. Co.*, 120 N. Y. 29;

Texas etc. Ry. Co. v. Marshall, 136 U. S. 393. See, also, *Waterman on Specific Performance*, sec. 49.

The decretal order of the chancellor is affirmed.

SPECIFIC PERFORMANCE—EFFECT OF INADEQUACY OF CONSIDERATION.—Inadequacy of price without fraud or other ingredient is not sufficient to stay the power of equity to enforce a contract for the sale of land, unless the inadequacy is so gross as to be evidence of fraud: *Seymour v. Delancy*, 3 Cow. 445; 15 Am. Dec. 270, and extended note. But under the Civil Code of California specific performance will not be decreed unless there was adequate consideration for the contract: *Morrill v. Everson*, 77 Cal. 114.

SPECIFIC PERFORMANCE—MUTUALITY OF CONTRACT.—A contract binding on one party only may be decreed to be specifically enforced: *Rogers v. Saunders*, 16 Me. 92; 33 Am. Dec. 635; *Yerkes v. Richards*, 153 Pa. St. 646; 34 Am. St. Rep. 721. *Contra*: *Banbury v. Arnold*, 91 Cal. 606; *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498; 3 Am. St. Rep. 758; *Benedict v. Lynch*, 1 Johns. Ch. 370; 7 Am. Dec. 484, and extended note; *De Cordova v. Smith*, 9 Tex. 129; 58 Am. Dec. 136; *Bodine v. Glading*, 21 Pa. St. 50; 59 Am. Dec. 749, and note; *Lattin v. Hazard*, 91 Cal. 87; *Alworth v. Seymour*, 42 Minn. 526. For a further discussion of the specific performance of unilateral contracts, see the note to *Warren v. Castello*, 32 Am. St. Rep. 673.

SPECIFIC PERFORMANCE OF CONTRACTS FOR PERSONAL SERVICES involving the exercise of special skill, judgment, and discretion, continuous in their nature, and running through an indefinite time, will not be decreed: *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498; 3 Am. St. Rep. 758, and note. See the note to *Clark's case*, 12 Am. Dec. 216, 217.

LEWIS v. WATSON.

[98 ALABAMA, 479.]

ESTOPPEL.—CLAIMING UNDER COMMON SOURCE OF TITLE.—Where both parties to an action to recover possession of real property claim under a common source of title neither is in a position to impeach it.

DEED SIGNED FOR THE GRANTOR.—If the name of the grantor is signed to a deed by another in his presence, at his request, and as and for his act, the deed is as effective as if signed by himself.

THE ACKNOWLEDGMENT OF A DEED BY A GRANTOR WHO DID NOT HIMSELF SIGN It is a sufficient recognition and adoption of the signature.

DEED.—THE DELIVERY OF A SHERIFF'S DEED MAY BE PRESUMED from the fact that it was given by him to the recorder of deeds, who took it to his office and recorded it, especially if it further appears that the grantee took and still holds possession of the lands conveyed, and the deed is in the possession of his personal representative.

DEED.—IF AN INTERLINEATION IN A DEED is in the same handwriting as the body, and accords with the manifest object of the deed, a fair presumption is that it was made before the acknowledgment of execution, and the burden of repelling this presumption must be assumed by the person seeking to avoid the deed.

EXECUTION SALE.—THE RETURN OF A SHERIFF ON A writ is not essential to the validity of his deed.

ADVERSE POSSESSION.—TO REBUT A CLAIM OF ADVERSE POSSESSION it is competent to prove that the claimant was put in possession under a writ of assistance at a date later than that on which he alleges his adverse possession commenced, and also to show his admissions, under oath or otherwise, that the land was another's.

John Gamble, for the appellant.

J. W. Posey, for the appellee.

480 **MCCLELLAN, J.** This is a statutory action for the recovery of a certain lot of land in the town of Andalusia. Watson is plaintiff, and Lewis, as administrator of one Holley, deceased, is defendant. Plaintiff derives title from one Dixon by deed, appearing to have been executed in 1866. Defendant claims title through Watson, under a sale and conveyance by the sheriff to his intestate in 1875, made in satisfaction of certain judgments against Watson, and also by virtue of an adverse possession on the part of the intestate and himself subsequent to said sale and conveyance.

1. Some rulings were made on the trial in respect of Watson's title to the land prior to the sheriff's sale and conveyance of it as his property to Holley, and upon testimony in relation thereto. These are of no importance in the case; and whether erroneous or not in the abstract, need not be considered, since the defendant, claiming as he does under that title, and having recognized its validity by purchasing at the sheriff's sale, and now further recognizing it by a reliance upon the acquisition of it through that sale, and upon adverse possession since that time under the color of title, with which at least he was invested by the conveyance then made by the sheriff, is not in a position to impeach Watson's original title: *Ware v. Dewberry*, 84 Ala. 568; *Houston v. Farris*, 71 Ala. 570; *Tennessee etc. R. R. Co. v. East Alabama Ry. Co.*, 75 Ala. 516, 525; 51 Am. Rep. 475.

2. The evidence as to the execution of the deed by the sheriff to Holley was that of the probate judge of the county, and as follows: "That J. A. Thompson, the sheriff, could not write his name, and that he [the witness] frequently wrote in the sheriff's office for said Thompson; that he indorsed the levies on the execution here in evidence, and wrote the deed of Thompson, as sheriff, to Alfred Holley, dated May 8, 1875; that said deed and indorsements of said levies are in his handwriting; that said J. A. Thompson was present 481 when

said deed was written; that it was written in the sheriff's office, at Thompson's instance and under his direction; that after the deed was written Thompson told him to sign his name as sheriff to the deed, which he did, and then, as judge of probate, took Thompson's acknowledgment to the deed and carried it into the probate office, and afterwards recorded it, . . . and that some one came and got the deed from the probate office after it was recorded, but don't now remember who it was."

It is not entirely clear on this testimony that Thompson was actually and immediately present when his name was subscribed to the deed by Fletcher by his direction, but manifestly there was room for an inference to be drawn to that effect by the jury. If he was so present, as the jury might have found, the subscription to the instrument was as efficacious as had he been able to write his name, and with his own hand had written it, or he being unable to write his name, as if he had made his mark, and the words "his mark" had been written against it, and the signature thus made attested by two witnesses. This on the principle that where the grantor is present, and authorizes another, either expressly or impliedly, to sign his name to the deed, it then becomes his deed, and is as binding upon him, to all intents and purposes, as if he had personally affixed his signature. The reason for the doctrine is thus stated by Shaw, C. J.: "The name being written by another hand, in the presence of the grantor and at her request, is her act. The disposing capacity, the act of mind, which are the essential and efficient ingredients of the deed, are hers, and she merely uses the hand of another, through incapacity or weakness, instead of her own to do the physical act of making a written signature. To hold otherwise would be to decide that a person having a full mind and clear capacity, but through physical inability incapable of making a mark, could never make a conveyance or execute a deed": *Gardner v. Gardner*, 5 Cush. 483; 52 Am. Dec. 740; 1 Devlin on Deeds, secs. 232, 233; *Kime v. Brooks*, 9 Ired. 218; *Frost v. Deering*, 21 Me. 156; *Videau v. Griffin*, 21 Cal. 390; Maine Rev. Stats. 1857, p. 56; *Lovejoy v. Richardson*, 68 Me. 386; *Bird v. Decker*, 64 Me. 551.

3. And it would seem that if the signing by Fletcher under the direction and in the immediate presence of Thompson was not in itself efficacious, the subsequent acknowledgment of the latter, as shown on the deed, would be a sufficient

recognition and adoption of the signature as his own: *Bartlett v. Drake*, 100 Mass. 174; 97 Am. Dec. 92; 1 Am. Rep. 101.

4. Certain it is that this acknowledgment relieves the deed ⁴⁸² from any infirmity which might otherwise have affected it on account of the signature not being attested by witnesses: 1 Brickell's Digest, p. 530, sec. 18 et seq.; 2 Brickell's Digest, p. 298, sec. 18.

5. As we have seen, Fletcher, the probate judge, took the deed, after it was signed and acknowledged, for the purpose of recording it in his office. This, nothing appearing to the contrary, may well be considered as a delivery to him by the grantor for that purpose, and so considered, "there being no evidence to weaken the force of these facts," this constituted sufficient proof of delivery to the grantee: *Elsberry v. Boykin*, 65 Ala. 336; *Alexander v. Alexander*, 71 Ala. 295; *Sheffield Land etc. Co. v. Neill*, 87 Ala. 158.

6. And, moreover, at the time of the trial below, this deed was in the possession of the personal representative of the grantee, who, in that capacity, had also the possession of the land in controversy, and was defendant to this action for its recovery. The presumption from this fact alone, unexplained, is that the execution of the instrument had been duly perfected by a delivery of it to the grantee: *Cherry v. Herring*, 83 Ala. 458; *Simmons v. Simmons*, 78 Ala. 365.

And our conclusion, therefore, is that it is shown by the evidence in this record that there was an efficacious delivery of the deed by the grantor, the sheriff, to the grantee, Alfred Holley.

7. It is stated in the bill of exceptions immediately following the copy of the deed that "the Jordan lot No. 1 in the above deed was interlined in different handwrite from the body of the deed." This "Jordan lot No. 1" is the lot involved in this suit. We need only say in this connection that this statement is not borne out by a reference to the original deed, which is before us by order of the trial judge. The lot in controversy, leaving out of view the interlineation, is therein described and conveyed as "lot No. 1, east of the public square," and it clearly appears that this lot No. 1 on the east side of the public square is the Jordan lot. This would have been a sufficient description in the particular under consideration had nothing more been said; but it seems that the grantor did not think so, and for the purpose of curing what might be supposed to be an insufficient description, he interlined,

the interlineation and the body of the deed being clearly in the same handwriting, the words, "the lot known as the Jordan lot." Manifestly, the interlineation accorded "with all the purposes and objects of the deed," the fair presumption is that it was made before the acknowledgment of execution; and the burden of repelling ⁴⁸³ the presumption rested on the plaintiff: *Sharpe v. Orme*, 61 Ala. 263.

8. The fact that Fletcher indorsed the levies under which the sale was made on the executions for the sheriff is of no consequence. Even were it essential to the validity of defendant's deed that the return should have been made by the sheriff, the facts here show an adoption and ratification by the latter of the indorsement made by Fletcher so as to make it his own; and it was his own in the first instance, if entered by Fletcher by his direction and in his presence. But the return of the levy is not essential to the validity of the sheriff's deed to the purchaser at execution sale: 2 Freeman on Executions, sec. 341; *Forrest v. Camp*, 16 Ala. 642; *Love v. Powell*, 5 Ala. 58; *Driver v. Spence*, 1 Ala. 540.

9. It follows from what we have said, that if the jury believed that Fletcher signed the sheriff's name to the deed we have been discussing, at the instance and in the presence of the latter, as is inferable from the evidence, Holley acquired a perfect title to the land in question on May 3, 1875, when that deed was executed. It is not pretended that there has been any conveyance of this title by Holley or his privies in estate since that time, nor is it pretended that Watson has received a conveyance of this land from any source since that time. The legal title to the lot, therefore, was, at the time, and for all the purposes of the trial, in the estate of Holley, and represented in this action by the defendant Lewis, as his administrator, unless Watson for some period of ten years after May 3, 1875, and prior to the institution of this suit, has been in the open, adverse, uninterrupted possession under a claim of right; and that is really, we take it, the main question in issue in the case. On that issue, it would, we think, be competent for the defendant to show by the records of the circuit court in a former action of ejectment between these parties that Holley recovered therein against Watson, and was put into possession of the land under a writ of assistance in May, 1880, as going, not in bar of this action for a former recovery, but to show that at the time referred to Holley and not Watson was in possession. It would, in our

opinion, also be competent for the defendant to show any admissions or statements made under oath or otherwise by the plaintiff subsequent to 1875, to the effect that the land was another's, and not his, as going to show that at the time they were made he was not in possession of the lot, under a claim of ownership, and as also tending to impeach his evidence in that regard ⁴⁸⁴ on another trial of this cause, should it then be the same, or like that on the trial which we are now reviewing.

Many rulings of the trial court on the admission of evidence, and in respect of charges given and refused, are out of harmony with the foregoing opinion.

What we have said will suffice for the circuit court's guidance on another trial without a specification here of the particulars in which error appears by this record.

Reversed and remanded. —

EJECTMENT—CLAIMING UNDER COMMON SOURCE OF TITLE—ESTOPPEL.—

Where parties claim under a common source of title neither can impeach the title of the common ancestor: *Doe v. Dugan*, 8 Ohio, 87; 31 Am. Dec. 432; *Bedford v. Urquhart*, 8 La. 234; 28 Am. Dec. 137; *Schwallback v. Chicago etc. Ry. Co.*, 69 Wis. 292; 2 Am. St. Rep. 740, and note. If both parties to an action claim to have derived title from the same person, neither is required to show title in him: *Finch v. Ullman*, 105 Mo. 255; 24 Am. St. Rep. 383, and note. See, further, the note to *Barrett v. Hinckley*, 7 Am. St. Rep. 341, and the extended note to *Gilliam v. Bird*, 49 Am. Dec. 383, where this subject is thoroughly discussed.

DEEDS—EXECUTION BY ONE OTHER THAN GRANTOR.—A deed signed "A per B" will be presumed to have been signed in the presence and by the authority of the former if he was unable to read or write, and B was in the habit of signing deeds for him, and the persons claiming under him have been in undisturbed possession for many years: *Kennedy v. Gramling*, 33 S. C. 367; 26 Am. St. Rep. 676. So a grantor's name signed to a deed by a third person in his presence, with his verbal assent, with the addition "by G.," the person signing is sufficient, because it is deemed the grantor's own act: *Gardner v. Gardner*, 5 Cush. 483; 52 Am. Dec. 740, and note. To the same effect is *Reinhart v. Miller*, 22 Ga. 402; 68 Am. Dec. 506.

DEEDS—ACKNOWLEDGMENT BY ONE WHO DID NOT SUBSCRIBE HIS NAME THERETO.—Where a person whose name has been subscribed to a deed in his absence appears, and duly acknowledges the execution of the deed, he thereby adopts the signature as his own: *Bartlett v. Drake*, 100 Mass. 174; 1 Am. Rep. 101; *Clough v. Clough*, 73 Me. 487; 40 Am. Rep. 386.

EXECUTION SALE—SHERIFF'S DEED, WHETHER INVALIDATED BY NON-RETURN.—A sheriff's deed is not invalidated by the non-return of the writ under which the sale was made: *Hinds v. Scott*, 11 Pa. St. 19; 51 Am. Dec. 506, and note; *Doe v. Rue*, 4 Blatchf. 263; 29 Am. Dec. 368; *Leshey v. Gardner*, 3 Watts & S. 314; 38 Am. Dec. 764.

FIRST NATIONAL BANK v. SLAUGHTER.

[98 ALABAMA, 602.]

NEGOTIABLE PAPER.—The fact that a note otherwise negotiable contains a provision for the payment of attorneys' fees, and waives all exemptions, and stipulates that the property for which it was given shall remain as security for the debt, does not destroy its negotiability.

NEGOTIABLE PAPER NEGOTIATED FOR VALUE BEFORE MATURITY to a *bona fide* holder is not subject to any defense available against the payee, nor to any set-off or recoupment.

M. W. Rushton, for the appellant.

I. H. Parks, for the appellee.

603 COLEMAN, J. The instrument sued on possesses all the requisites of commercial paper. It is made payable absolutely at a designated bank, for a sum certain, and at a definite time. The fact that it contains a provision for the payment of attorney's fees, a waiver of exemptions, or the retention of the legal title to the property for which it was given as security for the payment of the debt, does not impede its circulation or impair its validity as negotiable paper: *Montgomery v. Crossthwait*, 90 Ala. 553; 24 Am. St. Rep. 832; *McGhee v. Importers' etc.* 604 *Bank*, 93 Ala. 192. The circuit court was in error in holding that the paper, the foundation of the suit, was not commercial paper.

There are other exceptions reserved, a consideration of which would lead to a reversal of the case on other grounds; but we are of opinion that all such questions will be eliminated from the case on another trial. The holder of such paper, received in due course of trade before maturity, for a valuable consideration, without notice, is not affected by any defense or equities which might be available to the maker against the payee; and by the express provision of the statute of this state, "paper governed by the commercial law, negotiated before maturity, is not subject to set-off or recoupment": Code of 1886, sec. 2684.

The evidence shows that plaintiff became the owner, in due course of trade for value, before maturity. There is no proof of notice to the plaintiff, nor of facts calculated to put him upon notice, of any defense to the note. Under such circumstances the plaintiff was entitled to a verdict: *Ross v. Drinkard*, 35 Ala. 441; *Johnson v. Hanover Nat. Bank*, 88 Ala. 274, 275; *Barton v. Barton*, 75 Ala. 400.

Reversed and remanded.

NEGOTIABLE INSTRUMENTS—EFFECT OF STIPULATION TO PAY ATTORNEY'S FEES.—A stipulation in a negotiable instrument to pay all attorney's fee, in case of a suit thereon does not destroy its negotiability: *Bank of Commerce v. Fuqua*, 11 Mont. 285; 28 Am. St. Rep. 461, and note; *Montgomery v. Crossthwait*, 90 Ala. 553; 24 Am. St. Rep. 832, and note; *Bowie v. Hall*, 69 Md. 433; 9 Am. St. Rep. 433, and note; *Dorsey v. Wolff*, 142 Ill. 589; 34 Am. St. Rep. 99, and note. See, also, the extended note to *Witherspoon v. Musselman*, 29 Am. Rep. 406.

NEGOTIABLE INSTRUMENTS—RIGHTS OF BONA FIDE PURCHASERS.—The bearer of a note payable to a person named or bearer, who takes it before maturity, holds it free from any equity or set-off between the original parties: *Pettee v. Prout*, 3 Gray, 502; 63 Am. Dec. 778; *Flournoy v. First Nat. Bank*, 78 Ga. 222; *National etc. Bank v. Noyes*, 62 N. H. 35; *National Bank v. Anderson*, 32 S. C. 538. One who purchases negotiable paper before maturity for a valuable consideration in the usual course of business, without knowledge of facts which impeach its validity as between antecedent parties, or which ought to excite suspicion in the mind of a prudent man is a *bona fide* holder, and takes the paper free from defense on the part of the maker: *Rublee v. Davis*, 33 Neb. 779; 29 Am. St. Rep. 509; *Mechanics' etc. Bank v. Seitz*, 150 Pa. St. 632; 30 Am. St. Rep. 853. A *bona fide* purchaser of a negotiable instrument for value before maturity, without notice or knowledge of defects, acquires title thereto as against the world: *Williams v. Huntington*, 68 Md. 590; 6 Am. St. Rep. 477; *Head v. Cole*, 53 Ark. 523. One who takes negotiable paper in payment of an antecedent debt, before maturity, and without notice of any defect therein, is entitled to enforce its payment, without regard to the defenses that may exist between the other parties to the paper: *Tabor v. Merchants' Nat. Bank*, 48 Ark. 454; 3 Am. St. Rep. 241, and note. A negotiable note payable to bearer, delivered before maturity, is not subject to defenses of the existence of which he was not notified when he acquired it: *Mars v. Mars*, 27 S. C. 132. See the extended note to *Sims v. Lyles*, 26 Am. Dec. 158.

GARRETT v. HEFLIN.

[98 ALABAMA, 615.]

WILLS—A WITNESS TO A WILL NEED NOT BE INFORMED OF ITS CONTENTS—WILLS DRAWN BY BENEFICIARY.—It is not necessary to prove that a will was read over or explained to the testator at the time it was executed if he could both read and write. Even when the will is drawn by one who is a beneficiary thereunder, it will be sustained if there is legal evidence satisfying the court that it expresses the spontaneous intention of the testator, though there is no direct proof that it was read or explained to him at the time of its execution.

WILLS.—A WITNESS MAY ATTEST A WILL BY HIS MARK where the testator signs his own name.

J. M. and E. M. Oliver, for the appellant.

W. L. Hood, for the appellees.

617 COLEMAN, J. The present bill was filed under section 2000 of the code, to contest the validity of the will of Prudence Bailey, which had been admitted to probate by the probate court of Chambers county. The grounds of contest are fraud, want of testamentary capacity, and undue influence.

Testatrix died without issue or descendants, but left surviving her a brother, the complainant, and also descendants of a sister. Her former slaves and their children, and Mrs. Vickers, who waited upon and attended to her during the latter three or four years of her life, were the devisees and legatees of her will, and by the ninth clause of the will W. L. Heflin was made her residuary legatee. No provision was made for any of her next of kin by her will.

The will was attested by one witness, who could and did write his name as such, and by two other witnesses, who could not write, but subscribed their names by making their mark. The instrument was declared to be, and duly published by testatrix at the time of signing it, and when attested, her last will and testament.

The evidence is in conflict as to whether the will as an entirety was read over to her and explained at the time it was executed and published. We know of no law which requires that the witnesses to a will should be informed of its contents. It is rarely the case that a witness is informed of the contents of an instrument which he attests: *Laverett v. Carlisle*, 19 Ala. 80.

It is not pretended that testatrix could not read and write. All the evidence tends to show she could do both. Testamentary **618** capacity has been so often declared and defined in this state, it is unnecessary to repeat the general rule again. See the following authorities: *Kramer v. Weinert*, 81 Ala. 414; *O'Donnell v. Rodiger*, 76 Ala. 222; 52 Am. Rep. 322; *Taylor v. Kelly*, 31 Ala. 59; 68 Am. Dec. 150; *Stubbs v. Houston*, 33 Ala. 555; *White v. Farley*, 81 Ala. 563; *Bulger v. Ross*, 98 Ala. 267.

There is some evidence tending to show that testatrix, at the time, labored under some mental delusions or hallucinations, was at times, on some subjects "flighty," as to matters not at all connected with the practical transactions of life; but a consideration of all the evidence satisfies us that testatrix possessed sufficient mental capacity to make a valid will.

The law as to what constitutes undue influence has also been clearly settled by numerous decisions: *Eastis v. Montgomery*, 93 Ala. 300; *Lyons v. Campbell*, 88 Ala. 462; *Leeper v. Taylor*, 47 Ala. 222; *Pool v. Pool*, 35 Ala. 17; *Taylor v. Kelly*, 31 Ala. 64; 68 Am. Dec. 150; *Bancroft v. Otis*, 91 Ala. 290; 24 Am. St. Rep. 904.

As to all the devisees and legatees under the will, except W. L. Heflin, the residuary legatee, there is not only no evidence to show that testatrix was unduly influenced by them, but it is affirmatively shown that the provisions made for them was in accord with the intentions of testatrix. A different principle of law applies to Heflin, the residuary legatee. He wrote the will. In the case of *Hill v. Barge*, 12 Ala. 687, it is said: "Ordinarily, when a man of sound mind and memory executes a will by signing and publishing it, and calling on witnesses to attest, the presumption is that he knew the contents, although it is not written by him. But when the will is written by the person intended to be benefited by it, the presumption and *onus probandi* are against the instrument; but as the law does not render such an act invalid, the court has only to require strict proof; the *onus probandi* may be increased by circumstances," etc. It is said in the opinion rendered in the foregoing case, that "the proof should be so satisfactory and convincing as not to leave a reasonable doubt on the minds of the jury that the testator knew its contents at the time of its execution." Possibly, the measure of proof exacted by this statement is too stringent. In civil cases the proper measure of proof is, that the jury must be reasonably satisfied of the truth of any fact.

In the case of *Daniel v. Hill*, 52 Ala. 430, after quoting from many authorities, the court cites with approbation the following rule: "When a will is drawn by a person standing in a confidential relation to the testator, who takes a considerable ⁶¹⁹ benefit under it, that it is not necessary to prove the will was read over to the testator, or instructions given for its drawing, but that the court must be satisfied the will expresses the real intentions of the testator. The authorities in this country assert the same doctrine. Affirmative evidence, in any legal mode, that the will expresses the spontaneous intentions of the testator satisfies the court, and removes the unfavorable presumptions which would otherwise be indulged." The same rule is declared in *Lyons v.*

Campbell, 88 Ala. 469, and in the more recent case of *Bancroft v. Otis*, 91 Ala. 290; 24 Am. St. Rep. 904.

It becomes necessary to examine the facts and circumstances surrounding and connected with the execution and publication of the will.

It appears that testatrix and her husband had resided on the place where she died for more than forty years; that her husband, Jacob Bailey, died about twelve years before testatrix's death, and left some portion of his property to his old servants and the remainder to his wife, the testatrix. The will of Jacob Bailey was not introduced in evidence, but such seems to have been the disposition made of his property. During the forty or more years testatrix resided in Alabama, it does not appear that she visited her relatives who resided in Georgia, or that any of them visited her, or had any communication with her, except the complainant, who visited her twice and wrote to her. There is some evidence of declarations made by testatrix, to the effect that her relatives were displeased at her marriage with Jacob Bailey, and that she and her husband moved away from them to Alabama, and that by their own efforts, with the assistance of their servants, some of whom were their former slaves, they had made what property they owned, and that she did not care to let her next of kin have her property. There was certainly no concealment of the making of the will. Three witnesses were called to attest it, none of whom, it seems, were at all especially friendly to Dr. Heflin. Two other witnesses were present, who did not attest the instrument. All knew it was her will. One of the witnesses, who attested the will, examined by complainant testified that the will was read over to the witnesses, but not to testatrix, in his presence. Another witness, examined by complainant, who was present, but did not attest the will, testified at one time that she heard the will read to testatrix, but she afterwards qualified this, by stating that the will was read to testatrix, except the ninth clause. The evidence shows that Dr. Heflin had been a warm personal friend of Jacob ⁶²⁰ Bailey in his lifetime and of testatrix for twenty years, and was their family physician; and after the death of her husband testatrix advised with him in all her business transactions. The will was written for more than a year before her death, and she was never heard to express any dissatisfaction with the will. Heflin testifies that the will was prepared at her repeated solicitation, and as

dictated by her, and that when he called her attention to her relatives, she said that her husband had made provision for their old servants, and she wanted to do the same thing, and that she did not intend to leave any of her property to her relatives, giving certain reasons for such intention.

Looking at all the evidence in the case, we cannot say the conclusion reached by the chancellor was not warranted by the evidence, and that the instrument declared and published as her will truly disposed of the property as testatrix intended.

It is contended that the will was not executed according to law, in that only one subscribing witness wrote his name, while the other witnesses only subscribed by making their marks. We are of opinion that this was a sufficient attestation of the will. Our statute, in this respect, is substantially the same as the English Statute of Wills: 29 Car. II., c. 3.

The direct question arose in the case of *Den v. Mitton*, 12 N. J. L. 70. The court charged the jury that "making of mark is a sufficient subscription by the witness." In considering this charge, the court said: "He who is unable to write his name, and makes his mark, is notwithstanding a competent and legal witness to the execution of a will." Citing a number of cases in support of the principle. In the case of *Bailey v. Bailey*, 35 Ala. 690, this court used the following language: "It is the settled construction of the English statute, and of similar statutes in the United States, that the signature of the testator, or of the witnesses, by making a mark, is sufficient." Citing many authorities. Of course, under our statute, section 1 of the code, where the testator or grantor cannot write, but subscribes by making his mark, the attesting witnesses must write their names. A mark in such a case is insufficient. But section 1, *supra*, in a case where the party to be bound writes his name, does not require that the attesting witnesses must also write their names. The question was considered in *Bailey v. Bailey*, 35 Ala. 690, and this was the conclusion of the court. We adhere to this construction.

In *Riley v. Riley*, 36 Ala. 496, *arguendo*, the same rule, that ⁶²¹ an attestation or subscription by a witness by his mark was a legal and sufficient attestation, was recognized. When the cases of *Bailey v. Bailey*, 35 Ala. 690, and *Riley v. Riley*,

36 Ala. 496, were decided, section 1 of the code was the existing law, as it now exists. See section 1 of the code of 1852.

We find no error in the record available to appellant, and the decree of the chancery court must be affirmed.

Affirmed.

WILLS—ATTESTATION—KNOWLEDGE OF CONTENTS BY SUBSCRIBING WITNESSES.—A will need not be read by or to the subscribing witnesses, nor is it necessary that they should know its contents: *Higdon's Will*, 6 J. J. Marsh. 444; 22 Am. Dec. 84.

WILLS—EXECUTION—NECESSITY THAT TESTATOR SHOULD HAVE READ WILL.—A testator must know the contents of his will, but, ordinarily, the law will take his bare signature as proof of such knowledge: *Hughes v. Meredith*, 24 Ga. 325; 71 Am. Dec. 127; *Robinson v. Brewster*, 140 Ill. 649; 33 Am. St. Rep. 265. A will is valid, though not read to or by the testator, where it is written in his presence and according to his dictation, and executed in accordance with the statutes: *Hess' Appeal*, 43 Pa. St. 73; 82 Am. Dec. 551; *Clifton v. Murray*, 7 Ga. 564; 50 Am. Dec. 411; *Hemphill v. Hemphill*, 2 Dev. 291; 21 Am. Dec. 331.

WILLS DRAWN BY A BENEFICIARY UNDER THEM is the subject of a monographic note to *Hughes v. Meredith*, 71 Am. Dec. 129.

WILLS—ATTESTATION BY MARK OF WITNESS.—A subscribing witness may attest a will by making his mark when his name is written by some one else: *Simmons v. Leonard*, 91 Tenn. 183; 30 Am. St. Rep. 875, and note; note to *Hamilton v. State*, 53 Am. Rep. 494.

MAYOR v. DAVIS.

[98 ALABAMA, 629.]

MUNICIPAL CORPORATIONS—MAJORITY VOTE OF MEMBERS, WHAT IS.—If a statute requires, for the purpose of filling a vacancy in a city council, a majority vote of the remaining members, such vacancy cannot be filled by a majority of those present, unless they also constitute a majority of all the members of the council, both present and absent.

MUNICIPAL CORPORATIONS.—AMENDMENT OF THE RECORDS of a meeting of a city council to make them speak the truth may be made at a subsequent meeting.

MUNICIPAL CORPORATIONS.—IF THE MINUTES OF A MEETING OF A CITY COUNCIL ARE AMENDED at a subsequent meeting thereof, the only remedy of a person injured thereby, and who claims that the original entry was correct, is by a direct proceeding to have the minutes as amended annulled, and the original minutes restored. While the amended minutes remain, they cannot be impeached or varied in a collateral proceeding.

Knox, Bowie, and Pelham, for the appellant.

Caldwell and Johnston, for the appellee.

632 COLEMAN, J. The city council of Anniston is composed of eight councilmen, two from each ward of the city. On the nineteenth day of May, 1892, R. J. Riddle, who was a member of the council from ward No. 1, tendered his resignation, which was accepted by the mayor and council, then in session. An election was held for the purpose of filling the vacancy caused by his resignation.

The minutes of the council meeting, at which these proceedings were had, are as follows:

"Council Chamber, Anniston, Ala., May 19th, 1892.

"Present: Jas. Noble, Sr., Mayor, and Councilmen R. J. Riddle, W. H. Weatherly, G. W. Jones, T. G. Dunn, N. H. Reid, D. M. Sawyer.

"Absent councilmen: A. S. Johnston, T. H. Slaughter. Mr. R. J. Riddle tendered his resignation as a member of the city council, which was accepted.

"An election was held to fill the vacancy. For this position Mr. Weatherly nominated Mr. W. A. Davis, and he was unanimously elected to fill said vacancy.

"Attest: Approved:

"GEO. T. ANDERSON,

JAMES NOBLE, SR.,

"Clerk.

Mayor."

"Council Chamber, Anniston, May 27th, 1892.

"Present: James Noble, Sr., Mayor, and Councilmen W. A. Davis, W. H. Weatherly, G. W. Jones, N. H. Reid, D. M. Sawyer. The minutes of the last regular and called meeting were read and approved.

"Attest: Approved:

"GEO. T. ANDERSON,

JAMES NOBLE, SR.,

"Clerk.

Mayor."

The charter, in section 4, provides that "vacancies occurring in the city council shall be filled by a majority vote of the remaining members thereof." And in section 15: "All elections by the city council shall be by *viva voce*, on the call of the roll."

At a regular meeting of the council, held September 23, 1892, N. H. Reid and G. W. Jones, two of the councilmen, in a protest to the council, stated that W. A. Davis had never been legally elected as a member of the council; that at the time of his supposed election, there were present only five councilmen, three of whom, Weatherly, Dunn, and Sawyer, voted for Mr. Davis; that Jones did not vote, and that Reid

voted against him. A resolution was then adopted, declaring ⁶³³ that Mr. Davis had not been legally elected, and the vacancy, caused by the resignation of R. J. Riddle, was still vacant. An election was then held to fill the vacancy, and Mr. R. H. Stickney, having received four votes, was declared duly elected. A resolution was then introduced to correct the minutes of May 19, 1892, "to make them speak the truth, and show the facts as set forth in the protest, by striking out the word 'unanimously,' in the minutes of the election of W. A. Davis." Five of the councilmen, exclusive of Mr. Stickney, voted for the adoption of the resolution. The minutes of the meeting of May 19, 1892, were corrected by resolution of the council to read as follows:

"Mr. R. J. Riddle tendered his resignation as a member of the city council, which, on motion of Mr. Weatherly, was accepted. An election was held to fill the vacancy caused by the resignation of Mr. Riddle. For this position Mr. Weatherly nominated Mr. W. A. Davis. The question being put by the chair, Mr. Davis was voted for by councilmen Weatherly, Dunn, and Sawyer. Of the other two members present, councilman Reid voted no, and councilman Jones did not vote.

"Attest:

Approved:

"GEO. T. ANDERSON,
"Clerk.

JAMES NOBLE, SR.,
Mayor."

Thereupon, Mr. Davis filed his petition praying for a writ of *mandamus* to be directed to the mayor and council, commanding that he be restored to his said office as councilman, with its rights and privileges. The petition sets out the facts substantially as we have stated them. Upon the filing of the petition a rule *nisi* was ordered. To the petition there was a demurrer, and the demurrer having been overruled, an answer was filed, in the nature of a return to the rule *nisi*, setting out substantially the same facts. A demurrer was sustained to the answer, or return, to the *nisi*, and a peremptory writ issued as prayed for in the petition. It will be noticed that the common council is composed of eight members. At the meeting at which Davis was elected only five members were present. To fill the vacancy occasioned by the resignation of Riddle, by the terms of the charter, "a majority vote of the remaining members" was necessary. The minutes of the council, as corrected, show that only three members, one less than

a majority of the remaining members, voted for Mr. Davis. If this be true, he was never legally elected. The council have no authority to disregard the charter provision. No subsequent approval or ratification could legalize or make valid a disregard of this mandate of the charter. The rule that a majority of a quorum controls has no application under ⁶³⁴ such a provision: *Lawrence v. Ingersoll*, 88 Tenn. 52; 17 Am. St. Rep. 870.

The main question, and about the only material one presented, is, whether the city council had the power at a subsequent meeting to correct the minutes of the meeting held on the 19th of May, 1892, at which Mr. Davis was elected, so as to show that his election was not "unanimous," and that in truth only three members of the council voted for his election, and if so what effect did the minutes, when thus corrected, have upon his claim to the office of councilman. We are of opinion that the common council was fully authorized to correct its minutes, so as to make them speak the truth, and this conclusion finds support in all the adjudicated cases we have been able to examine. Whether the correction shall be allowed to affect rights which have become vested in the interim presents altogether a different question. The correction can and should be made. The extent of the application of the corrected minutes must depend upon the circumstances to be affected. In the case before us no question is presented of rights acquired under or in consequence of the minutes of the meeting of May 19, 1892, as first entered upon the journal. The power of the council to correct its minutes at a subsequent meeting is discussed at length in the following authorities: 1 Dillon on Municipal Corporations, 3d ed., secs. 293, 297, and notes; 15 Am. & Eng. Ency. of Law, 1077, sec. 7, and notes. The petitioner does not deny that the minutes as corrected speak the truth. On the contrary, his demurrer to the answer and return of the respondents admit that only three votes were for his election. His contention is, that the council, once having declared that he was "unanimously" elected, had no power over its minutes at a subsequent council meeting, although held by the same members of the council. In this, petitioner has mistaken the law. If, in point of fact, the minutes as entered of the meeting of May 19, 1892, at which time he was declared to be elected, were correct, and spoke the truth, petitioner has his remedy. By direct proceeding for that purpose, he may have the minutes

of the council meeting of the 23d of September, 1892, set aside and annulled, and the minutes of May 19, 1892, restored. This would leave him a lawfully elected councilman, and if unlawfully removed by the mayor and council he would be entitled to the writ of *mandamus*. The authorities are numerous to this proposition: *Ex parte Lusk*, 82 Ala. 519; *Carter v. City of Durango*, 16 Col. 534; 25 Am. St. Rep. 294; *Board of Commissioners v. Johnson*, 124 Ind. 145; 19 Am. St. Rep. 88. So long as the ⁶³⁵ minutes of the meeting of September 23, 1892, remain as the minutes of the council, they cannot be impeached or varied in a collateral proceeding by parol testimony, and are a complete answer to the petitioner's prayer for a writ of *mandamus*.

The pleadings show an effort by one who was for a time a *de facto* officer by *mandamus* to compel his restoration to an office, held by a *de jure* officer, and the decision of the court upon the pleadings was to the effect that this could be done. In this the court was in error. We cannot say whether petitioner desires or can amend his petition, or whether he desires to take issue upon the facts set up in the answer to his petition, and which we have held, if sustained by the proof, was sufficient in law. We will reverse and remand the case, so that it may be determined in accordance with the principles herein declared.

Reversed and remanded. _____

MUNICIPAL CORPORATIONS—COMMON COUNCIL—MAJORITY OF MEMBERS, WHAT IS.—In an election by a definite body, as by a board of aldermen, in the absence of a statutory provision to the contrary, a majority of the body present and acting must vote for a candidate in order to elect him: *Lawrence v. Ingersoll*, 88 Tenn. 52; 17 Am. St. Rep. 870, and note. The acts of a majority present at town meetings bind not only the minority, but all who are absent: *Chamberlain v. Dover*, 13 Me. 466; 29 Am. Dec. 517.

MUNICIPAL CORPORATIONS.—Amending records: See the extended note to *Sawyer v. Manchester etc. R. R. Co.*, 13 Am. St. Rep. 553.

CASES

IN THE

SUPREME COURT

OF

FLORIDA.

OSBORNE v. STATE.

[33 FLORIDA, 162.]

CONSTITUTIONAL LAW—TAXATION OF OCCUPATIONS.—A state cannot tax a business occupation when it cannot tax the business itself, and a tax on the occupation of doing a business is a tax on the business.

INTERSTATE COMMERCE—TAXATION OF.—No state has a right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on.

INTERSTATE COMMERCE.—A state cannot tax nor regulate interstate commerce, nor make the payment of a tax, or the taking out of a license a condition precedent to carrying on interstate or foreign commerce.

INTERSTATE COMMERCE—TAXATION OF DOMESTIC BUSINESS.—A state statute imposing a general tax on certain kinds of business or occupations, and requiring a license to be taken out before such business or occupation shall be engaged in, must be construed as not applying to such business as may constitute interstate or foreign commerce, but only to such business of the kinds specified as constitutes local or state commerce, and to persons engaged or intending to engage therein.

INTERSTATE COMMERCE—TAXATION OF DOMESTIC BUSINESS.—The doing of business constituting interstate commerce by one who is also engaged in similar business that constitutes local or state commerce, cannot exempt his local or state commerce from taxation or regulation by the state.

INTERSTATE COMMERCE—TAXATION OF DOMESTIC BUSINESS—CONSTITUTIONALITY OF STATUTE.—A state statute providing that no person shall engage in or manage any business named therein without taking out a state license and paying an occupation tax and license fee, and authorizing counties and municipalities to impose additional taxes, and providing a penalty for a violation of its provisions, does not attempt to tax or regulate interstate commerce as distinguished from local or state commerce, and applies only to the latter. Such statute is valid when applied to the local or state business of an express company engaged

in both a state and interstate business or commerce, so long as it has a uniform operation throughout the state as to such business, and is not shown to be prohibitory or destructive thereof.

INTERSTATE COMMERCE—TAXATION OF DOMESTIC COMMERCE.—An express company which confines its business to interstate or foreign commerce is exempt from state taxation or regulation, but if it combines and carries on a local and state business, together with its interstate business, it is subject to state taxation and regulation so far as its local and state business is involved.

F. R. OSBORNE, the plaintiff in error and agent for the Southern Express Company, at Jacksonville, Duval county, Florida, was arrested for failure to pay a license required by a state statute before engaging in such business. Upon his refusal to give a bond for his appearance before the criminal court of Duval county to answer the charge against him, he was committed to jail, and thereupon sued out a writ of *habeas corpus* to test the legality of his arrest and detention. Upon the hearing of such writ his arrest and detention were adjudged to be legal, and he was remanded to jail. The order remanding him was brought before the supreme court by writ of error. There was an agreed statement of facts, including admissions of the agency, the incorporation of the company in another state, the failure to pay the license, the doing of business ordinarily done by express companies, of carrying goods and freights for hire, not only between points within the state, but also from points within the state to points outside of it, and *vice versa*; that 95 per cent of such business is interstate commerce, and that five per cent thereof is business done wholly within the state, and that such express company has an agent in nearly every town and county in the state. The statute under which the arrest was made provides as follows: "No person shall engage or manage the business, profession, or occupation mentioned in this section, unless a state license shall have been procured from the tax collector, which license shall be issued to each person on receipt of the amount hereinafter provided, together with the county judge's fee of 25 cents for each license, and shall be signed by the tax collector and the county judge, and shall have the county judge's seal upon it. Counties and incorporated cities and towns may impose such further taxes of the same kind upon the same subjects as they may deem proper, when the business, profession, or occupation shall be engaged in within such county, city, or town. The tax imposed by such city, town, or county shall not exceed

50 per cent of the state tax. But such city, town, or county may impose taxes on any business, profession, or occupation not mentioned in this section, when engaged in or managed within such city, town, or county. No license shall be issued for more than one year, and all licenses shall expire on the first day of October of each year, but fractional license, except as hereinafter provided, may be issued, to expire on that day, at a proportionate rate, estimating from the first day of the month in which the license is so issued; and all licenses may be transferred, with the approval of the comptroller, with the business for which they were taken out, when there is a *bona fide* sale and transfer of the property used and employed in the business as stock in trade; but such transferred license shall not be held good for any longer time, or for any other place, than that for which it was originally issued." Subdivision 12 of section 10 of the same statute provides that "all express companies doing business in this state shall pay, in cities of 15,000 inhabitants or more, a license tax of \$200; in cities of 10,000 to 15,000 inhabitants, \$100; in cities of 5,000 to 10,000 inhabitants, \$75; in cities of 3,000 to 5,000 inhabitants, \$50; in cities of 1,000 to 3,000 inhabitants, \$25; in towns and villages of less than 1,000 and more than 50 inhabitants, \$10. Any express company violating this provision, and any person that knowingly acts as agent for any express company before it has paid the above tax, payable by such company, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than \$50, or confined in the county jail not less than six months."

John E. Hartridge, for the plaintiff in error.

W. B. Lamar, attorney general, for the defendant in error.

168 RANEY, C. J. In the case of *Osborne v. Mobile*, 16 Wall. 479, decided in 1872, the ordinance then in question provided that every express and railroad company doing business in the city of Mobile, Alabama, and having a business extending beyond the limits of that state, should pay an annual license of a stated amount, and every such company doing a business within the limits of the state, and every such company doing business within the city, should take out license, paying therefor other amounts. Osborne was there, as here, the agent of the Southern Express Company, a

Georgia corporation, which transacted a general express business within, and extending beyond, the state of Alabama. The company fell under the first clause of the ordinance, and, notwithstanding its terms, that clause was held unobjectionable to the commerce clause of the federal constitution. The decision is founded expressly on the rule laid down in the case of the *State Tax on Railway Gross Receipts*, 15 Wall. 284, where it was said that it is not every thing which affects commerce that amounts to a regulation of it, within the meaning of the constitution, and was also admitted ¹⁶⁹ that the ultimate effect of the tax on such receipts might be to increase the cost of transportation, but was held that the right to tax the receipts, though derived in part from interstate transportation, was within the general authority of the state to tax persons, property, business, or occupations within their limits. In *Philadelphia and Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326, the decision in the case of the *State Tax on Railway Gross Receipts*, 15 Wall. 284, was considered and questioned; it being held by a unanimous court that a state tax upon the gross receipts of a steamship company incorporated under its laws, such receipts being derived from the transportation of persons and property by sea between different states, and to and from foreign countries, was a regulation of interstate and foreign commerce, and in conflict with the exclusive powers of Congress. That the Osborne case has been overruled by that of *Leloup v. Port of Mobile*, 127 U. S. 640, decided in 1888, cannot be denied; and it is clear that the first clause of the ordinance did, in terms and effect, impose a tax on that class of express companies which might be engaged in interstate commerce, as a distinct class from the other classes engaged, one in business not extending beyond the state, and the other in that not extending outside the corporate limits.

In *Leloup v. Port of Mobile*, 127 U. S. 640, an ordinance adopted in 1883 imposed an annual license tax of \$225 "on telegraph companies." Leloup was the agent of the Western Union Telegraph Company at Mobile, and the license tax not having been paid, a civil action was brought in the circuit court against Leloup to recover a pecuniary penalty which had been adjudged in another tribunal under the ordinance for its violation, ¹⁷⁰ the complaint in the circuit court alleging that the company was a New York corporation, having a place of business at Mobile, and had been engaged there in

the business of transmitting telegrams from and to points within Alabama, and between private individuals of that state, as well as between citizens thereof, and of other states. The plea alleged in substance Leloup's agency, and that the company's charter authorized it to construct and operate lines of telegraph in and between the various states of the union, including Alabama; and further, that on June 5, 1867, the company accepted the restriction and obligations of the act of Congress of July 24, 1866, and that in accordance with its charter, the act of Congress, and agreements with the railroad companies, it constructed and was, at the time of the alleged breach of the ordinance, maintaining and operating its lines of telegraph on various specified public railroads leading into Mobile, and through Alabama and several other named states, and into others, and over all the principal railroads, 'post roads, and military roads in the United States, said roads being public highways, and the daily mails being regularly carried thereon under authority of law and the direction of the postmaster general, and under and across navigable streams in said states, but without interruption to navigation of the streams, or travel on such military and post roads. That before and during the year 1883 it had been, and still was, engaged in the business of sending and receiving telegrams over such lines for the public between its office in Mobile and places in other states and territories of the United States, and to and from foreign countries; also in sending telegraphic communications between the several departments of the government of the United States and ¹⁷¹ their officers and agents, giving priority to said official telegraphic communications over all other business, such official communications being sent at rates fixed by the postmaster general annually since June 5, 1867. To this plea there was a demurrer, which was sustained by the circuit court, and judgment was given for the plaintiff and this judgment affirmed by the supreme court of Alabama. The supreme court of the United States reversed the judgment, and decided: 1. That the license tax imposed by the ordinance was purely a tax on the privilege of doing the business in which the telegraph company was engaged, the company being also required to pay taxes on its property as other corporations and individuals, and also a tax on its gross receipts within the state; 2. Stating that the question was

squarely presented whether a state, as a condition of doing business within its jurisdiction, may exact a license tax from a telegraph company, a large part of whose business is the transmission of messages from one state to another, and between the United States and foreign countries, and which is invested with the powers and privileges conferred by the act of Congress of July 24, 1866, and other acts incorporated in title 65 of the Revised Statutes. Proceeding to answer this question, it held that a state cannot tax a business occupation when it cannot tax the business itself, and that a tax on the occupation of doing a business is a tax on the business; that communication by telegraph is commerce, as well as in the nature of postal service, and if carried on between different states, it is commerce among the several states, and directly within the power of regulation conferred upon Congress, and free from the control of state regulations, except such as are strictly of a police character. In reply to the argument ¹⁷² that a portion of the company's business was internal to the state, and therefore taxable by the state, it is said that such fact does not remove the difficulty; that the tax affects the whole business without discrimination; and that there are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company. The cases of *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, and *Western Union Tel. Co. v. Texas*, 105 U. S. 460, are also referred to approvingly, and the conclusion reached in *Leloup's* case is declared to be plainly within the principles of the decisions in *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, and *Philadelphia etc. Steamship Co. v. Pennsylvania*, 122 U. S. 326, and the case is held to be parallel with that of *Brown v. Maryland*, 12 Wheat. 419; and the court declares that the fairest and most just construction of the constitution in all its parts "leads to the conclusion that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on; and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

It will be well to notice here the cases of *Pensacola Tel. Co.*

v. *Western Union Tel. Co.*, 96 U. S. 1, and of *Western Union Tel. Co. v. Texas*, 105 U. S. 460, referred to. The former case is one in which it was held that the above act of Congress, in so far as it declares that the erection of telegraph lines shall, as against state interference, be free to all who accept its terms and conditions, and that a telegraph ¹⁷³ company shall not, after accepting them, be excluded by another state from prosecuting its business within her jurisdiction, is a legitimate regulation of commercial intercourse among the states, and appropriate legislation to execute the powers of Congress over the postal service, and is not limited in its operation to such military and post roads as are upon the public domain. This act, it will be found, gives to all telegraph companies, organized under the laws of any of the states, the right to construct telegraph lines through and over any portion of the public domain of the United States, and over and along any of the military and post roads of the United States, and over and across the navigable streams and waters of the United States, with certain conditions as to construction; and grants the right to occupy land and use materials; and enacts that telegraphic communications between the several departments of the general government and their officers and agents shall, in their transmission over the lines of such companies, have priority over all other business, and be sent at rates to be annually fixed by the postmaster general; and also enacting that, before any company shall exercise the powers and privileges conferred thereby, it shall file its written acceptance with the postmaster general of the restrictions and obligations required by this act. And in *Western Union Tel. Co. v. Texas*, 105 U. S. 460, where a Texas statute required every chartered telegraph company doing business in that state to pay a tax of one cent on every full-rate message, and one-half cent for every message less than full rate, the state sued to recover the tax for messages, of which a large number were sent to places outside of the state, and by officers of the general government on public business. There was judgment for the state, no deductions being allowed by the state courts for ¹⁷⁴ messages sent out of the state, or by government officers on government business. The supreme court of the United States, in reversing the judgment, says: "The . . . company having accepted the restrictions and obligations of this provision by Congress, occupies, in Texas, the position of an instrument of

foreign and interstate commerce, and of a government agent for the transmission of messages on public business. Its property in the state is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business. The precise question now presented is whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the state, or sent by public officers on the business of the United States. . . . As such, so far as it operates on private messages sent out of the state, it is a regulation of foreign and interstate commerce, and beyond the power of the state. That is fully established by the cases already cited. As to the government messages, it is a tax by the state on the means employed by the government of the United States to execute its constitutional powers, and therefore void." The conclusion was that the judgment, in so far as it included taxes for government messages, or those sent out of the state, was erroneous, it being observed that any tax which the state might put on messages sent by private parties, and not by the agents of the general government, from one place to another exclusively within the jurisdiction of the state, will not be repugnant to the federal constitution, and that whether the stated law of Texas, in its present form, could be used to enforce the collection of such a tax was a question entirely within the jurisdiction of the courts of the state, and as to which the supreme court ¹⁷⁵ had no power to review. Still another case involving the effect of the act of Congress referred to above, and tending also to elucidate the question before us, independent of such legislation, is *Western Union Tel. Co. v. Attorney General*, 125 U. S. 530. The valuation of the entire capital stock of the company was obtained from the company, and from this there were made certain deductions allowable in determining the assessable value of such entire stock, and the value of the property of the company in the state was ascertained upon the basis of the proportion of the length of the lines within the state to the length of its lines throughout the country, and this value was assessed at the uniform rate of \$14.14 on each \$1,000 of valuation. The company contended that in view of the act of Congress, which it had accepted, no tax could be claimed for that part of its line—2,384.55 out of 2,833.05 miles—that was over, under, or across post roads. The Massachusetts law had a provision to the effect that upon

a failure to pay the taxes required to be paid to the treasurer, he might commence an action for the recovery of the same, and, further, that all penalties denominated by the act might be collected by informations, and that upon such information the court might issue an injunction restraining the further prosecution of business by the corporation, company, copartnership, or association until all such taxes due, or penalties incurred, should be paid, with interest and costs. The tax was held by the supreme court to be essentially an excise on the capital of the corporation, imposed in an attempt by the commonwealth to ascertain the just amount which any corporation engaged in business within its limits should pay as a contribution to the support of its government on the amount and value of the capital employed by the company ¹⁷⁶ therein; or, as elsewhere said, the tax, though nominally upon the shares of the capital stock, is, in effect, a tax upon that organization on account of property owned and used by it in the state, and the proportion of the length of its lines in the state to their entire length throughout the whole country is made the basis for ascertaining the value of that property. While, says the opinion, the state could not interfere by any specific statute to prevent a corporation from placing its lines along these post roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the state for the protection of its property and its rights is liable to be taxed upon its real and personal property, as any other person would be; and that it never could have been intended by Congress, in conferring upon a corporation of one state the authority to enter the territory of another, and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support. The tax was held to be valid, but that part of the state legislation which authorized an injunction was decided to be void; the court observing that the effect of the injunction was to utterly suspend the business of the company, and defeat its operations within the state; that if Congress had authority to say that the company might construct and operate its telegraph over these lines, the state can have no authority to say it cannot be done; but that in holding this portion of the act to be void, it was not meant to deprive the state of the power to assess and collect the tax.

In *Crutcher v. Kentucky*, 141 U. S. 47, a statute of Kentucky made it unlawful for any agent of ¹⁷⁷ any express company not incorporated by the laws of that state to carry on the business of transportation in that state without first obtaining a license therefor from the auditor; and before the auditor could issue such license to any agent of any company incorporated by any state of the United States, there had to be filed with such officer a copy of the company's charter, and a sworn statement showing the assets and liabilities of the company, amount of capital stock, how paid, and of what the assets of the company consist, and, in short, the financial condition of the company, and that it was possessed of \$150,000, either in cash or safe investments, inclusive of stock notes, such statement to be renewed annually. A fee of \$5, to be paid by the company or agent, was allowed to the auditor for issuing the license, and a like fee for filing copy of charter, and of \$10 for filing original and annual statements. Crutcher was indicted for doing business as the agent of the United States Express Company, an express company not incorporated by the laws of Kentucky, but trading and doing business as a common carrier, by express, of goods and other things of value in and through the county of Franklin and state of Kentucky, without having any license so to do, either for himself or for such company, and on a plea of not guilty was found guilty, and sentenced to pay a fine. There was an agreed statement of facts, including in its admissions the agency, the incorporation, and absence of license, and the doing of business ordinarily done by express companies in this country, of carrying goods and freight for hire, not only between points in the state, but also from points in the state to points out of it, and *vice versa*. The statement also showed ¹⁷⁸ the total amount of business done at the Frankfort office in November, 1888, and that not quite one-fourth of it was local to the state, and the balance was between places in the state and places outside of it. The court of appeals of Kentucky affirmed the judgment of conviction; but the supreme court of the United States reversed it, and, in doing so, said of the statute that it required from the agent of every express company a license before he can carry on any business for the company in the state, and that this, of course, embraced interstate business as well as business confined wholly within the state, and was a prohibition against the carrying on of interstate business without a compliance with the state law.

The requirement of the statement as to \$150,000 investment is also held to be a regulation of such commerce in its application to corporations or associations engaged in that business, and a subject belonging to the jurisdiction of the national, and not the state, legislature. "If," says the opinion, "a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other states, it would not be within the province of the state legislature to exact conditions on which they should carry on their business, nor to require them to take out a license therefor. To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject." In citing *Pickard v. Pullman Southern Car Co.*, 117 179 U. S. 34, and other cases, observes the opinion, the court has frequently decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it. Again, the court, addressing itself to the fact that the statement shows some business of a purely domestic character to have been done, says: "This is probably quite as much for the accommodation of the people of that state as for the advantage of the company; but, whether so or not, it does not obviate the objection that the regulations as to license and capital stock are imposed as conditions on the company's carrying on the business of interstate commerce, which was manifestly the principal object of its organization. These regulations are clearly a burden and restriction on that commerce. Whether intended as such or not, they operate as such; but taxes or license fees, in good faith, imposed exclusively on express business carried on wholly within the state, would be open to no such objection." The opinion also distinguishes the case from those of foreign corporations seeking to do a business which does not belong to the regulating power of Congress, as insurance business and manufacturing, and all other corporations whose business is of a local and domestic nature, as to all of which the state has full power to prescribe the

conditions of their doing such business in its limits: *Bank of Augusta v. Earle*, 13 Pet. 519; *Paul v. Virginia*, 8 Wall. 168; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727; *Philadelphia Fire Assn. v. New York*, 119 U. S. 110. The act was held null and void as applied to the case of Crutcher.

¹⁸⁰ The case of *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, cited by the attorney general, holds, as the same is summarized in the syllabus, that a statute which requires every corporation, person, or association operating a railroad within the state to pay an annual tax for the privilege of exercising its franchises therein, to be determined by the amount of its gross transportation receipts, and further provides that when applied to a railroad lying partly within and partly without the state, or to one operated as a part of a line or system extending beyond the state, the tax shall be equal to the proportion of the gross receipts in the state, to be ascertained in the manner provided by the statute, does not conflict with the constitution of the United States, and the tax thereby imposed upon a foreign corporation operating a line of railway partly within and partly without, the state, is one within power of the state to levy. By the terms of the statute passed in 1881 it was provided that "every corporation, person, or association operating any railroad in this state shall pay to the state treasurer, for the use of the state, an annual excise tax for the privilege of exercising its franchises in this state." The named railway company was a Canadian corporation, having its place of business at Montreal. Its railroad in Maine had been constructed by a Maine corporation, whose charter authorized it to construct and operate a railroad from Portland to the boundary of the state, and, with the permission of New Hampshire and Vermont, it constructed a railroad from that city to a point in Vermont. In 1853 the Maine company leased its rights and privileges to the Canadian company, which, since then, had operated the road and used its franchises. The manner of ascertaining the amount of the tax was as follows: The ¹⁸¹ amount of gross transportation receipts for the year ending September 30th, preceding the levying of the tax, was to be divided by the number of miles of railroad operated, to ascertain the gross receipts per mile, and the tax was to be fixed on a scale of percentage varying according to the average receipts per mile, not to exceed, in any event, a stated

percentum; and when a road lay partly within and partly without the state, or was operated as a part of a system extending beyond the state, the gross transportation receipts of the railroad line or system over its whole extent, within and without the state, were to be divided by the total number of miles operated, to obtain the gross receipts per mile, and the gross receipts in the state were to be taken to be the average gross receipts per mile, multiplied by the number of miles operated within the state. The supreme court held the tax to be an excise tax upon the corporation for the privilege of exercising its franchises within the state of Maine, and it is said in the opinion that the privilege of exercising the franchises of a corporation within a state is generally one of value, and often of great value, and the subject of earnest contention, and that as the granting of the privilege rests entirely in the discretion of the state, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the state, in its judgment, may deem most conducive to its interest and policy, and it may require the payment into its treasury each year of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts of present or of past years; and further, that the erroneous ruling of the lower court, to the effect that the tax in question was a regulation of interstate ¹⁸² and foreign commerce, was founded upon the assumption that a reference by the statute to the transportation receipts, and adopting a certain percentage of the same for determining the amount of the excise tax, was in effect the imposition of the tax upon such receipts, and therefore an interference with interstate and foreign commerce, whereas the resort to the stated methods was not an interference with transportation, domestic or foreign, over the road of the railroad company, or any regulation of commerce consisting in such transportation; and there being no levy by the statute on the receipts themselves, either in form or fact, they constituting merely the means of ascertaining the value of the privilege conferred. The case is assimilated by the court to that of *Home Ins. Co. v. New York*, 134 U. S. 594, where a portion of the capital stock of the company was invested in bonds of the United States, and by an act of the legislature of New York it was declared that certain classes of companies, with certain exceptions, incorporated under the laws

of that state, or of any other state or country, and doing business in New York, should be subject to a tax on its corporate franchise or business, to be computed at a varying percentage on its capital stock, according as its dividends thereon should be more or less, or there should be no dividend, as stated in the act. The company resisted the payment of the tax, asserting that it was one upon the capital stock of the company, and that consequently there should be deducted from the amount of the tax a sum bearing the same ratio thereto that the amount invested in government bonds, which were exempt from taxation, bore to its capital stock, and that the law requiring a tax without such reduction was unconstitutional, and void. It was held, however, that the tax was not on the capital ¹⁸³ stock, nor upon any bonds of the United States composing a part thereof, but upon the corporate franchise or business of the company, and that reference was only made to the stock and dividends for the purpose of determining the amount of the tax to be exacted each year.

In 1879 the legislature of Pennsylvania enacted a statute to the effect, as far as it need be stated, that no foreign corporation, except insurance companies, that did not invest and use its capital in that commonwealth, should have an office or offices therein for the use of its officers, stockholders, agents, or employees, unless it should have first obtained from the auditor general an annual license so to do, and for such license pay into the state treasury, annually, one-fourth of a mill on each dollar of capital stock that it was authorized to have, such payment to be made before the license could issue. This statute has been before the supreme court of the United States in the case of *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, and in *Norfolk etc. R. R. Co. v. Pennsylvania*, 136 U. S. 114. In the former case it appeared merely that the appellant company, a corporation organized under the laws of Colorado for the purpose of carrying on a general mining and milling business in that state, with its principal office there, had an office in the city of Philadelphia, Pennsylvania, for the use of its officers, stockholders, agents, and employees, and, not having complied with the law, an action was brought to recover of it the tax and penalty authorized by the statute. The tax was sustained by the supreme court of the United States, as not in conflict with the commerce clause of the constitution; and Judge Field, speaking for the court, said of the

statute that it imposed no prohibition upon the transportation into Pennsylvania ¹⁸⁴ of the products of the corporation or upon their sale in the commonwealth, but exacted only a license tax from the corporation, when it has an office in the commonwealth, for the use of its officers, stockholders, agents, or employees; and it is also observed by him that the only limitation upon the power of a state to exclude a foreign corporation from doing business within its limits, or hiring officers for that purpose, or to exact conditions for allowing it to do business or have offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign; that the control of such commerce, being in the federal government, is not to be restricted by state authority. In the second case there was a different state of facts. The road of the railroad company, a corporation existing under the laws of Virginia and West Virginia, though entirely within the two states named, was a link in a through line of railroad, by which passengers and freight were carried into Pennsylvania from other states, and from that state to other states; and it kept its office in Philadelphia for its stockholders, officers, agents, and employees for the "furtherance of its business interests in the matter of its commercial relations," and did not "exercise or seek to exercise any privilege or franchise not immediately connected with interstate commerce, and required for the purposes thereof." The Pennsylvania courts held that the company was subject to the tax imposed by the statute, but the supreme court of the United States decided that the office was maintained because of the necessities of the interstate business of the company, and for no other purpose, and that a tax upon the company was, therefore, a tax upon one of the means or instrumentalities of the company's interstate ¹⁸⁵ commerce, and as such was in violation of the commerce clause of the constitution.

In *McCall v. California*, 136 U. S. 104, the appellant was an agent in the city and county of San Francisco for the New York, Lake Erie, and Western Railroad Company, a railroad corporation having its principal place of business in Chicago and operating a continuous line of road between Chicago and New York; and as such agent his duties consisted in soliciting passenger traffic in that city and county over such road. He did not sell tickets to passengers over that or any other road, but took the passengers to the Central Pacific Railroad

Company, where tickets were sold them. The only duty he was required to perform for such company was to induce people who contemplated taking a trip east to be booked over the line he represented, he neither receiving nor paying out any money or other valuable consideration on account thereof. An ordinance of San Francisco prescribed certain rates of license, and, among others, "for every railroad agency, \$25 per quarter," and made any violation of the ordinance a misdemeanor. McCall was convicted by the state court upon the above state of facts, and the further circumstance that he had not complied with the ordinance. The tax was exacted of him as a condition precedent to carrying on the business. "It is admitted," said the opinion of the supreme court of the United States, reversing the state court, that "the travel which it was his business to solicit was not from one place to another within the state of California. His business, therefore, as a railroad agent had no connection, direct or indirect, with any domestic commerce between two or more places within the state. His employment was limited exclusively to inducing persons in the state of California ¹⁸⁶ to travel from that state into and through other states to the city of New York." The conclusion was, the business of the agent was interstate commerce, and that the tax was forbidden by the federal organic law.

In *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, the decision was that a state statute imposing a tax on the capital stock of all corporations engaged in the transportation of freight or passengers within the state, under which a corporation of another state engaged in running railroad cars into, through, and out of the state, and having at all times a large number of such cars within the state, is taxed by taking as a basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the state bears to the whole number of miles in that and other states over which its cars are run, does not, as applied to such a corporation, violate the interstate commerce provision of the federal constitution. In the opinion of the court, by Judge Gray, it is said, citing *Moran v. New Orleans*, 112 U. S. 69; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 84; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, and *Leloup v. Mobile*, 127 U. S. 640, that much reliance was placed by the plaintiff in error upon the cases in which it has been decided that citizens or corporations of one state cannot

be taxed by another state for a license or privilege to carry on interstate or foreign commerce within its limits, and is then observed that in each of those cases the tax was not on the property employed in the business, but upon the right to carry on the business at all, and was therefore held to impose a direct burden on the commerce itself.

In *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, a Tennessee statute enacted that "all drummers, ¹⁸⁷ and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods, wares, or merchandise therein, by sample, shall be required to pay to the county trustee the sum of \$10 per week, or \$25 per month, for such privilege, and no license shall be issued for a longer period than three months." Robbins, according to the agreed statement of facts, was a citizen and resident of Cincinnati, Ohio, and was engaged in the taxing district of Shelby county, Tennessee, in the business of drumming—soliciting trade by the use of samples—for the firm of Rose, Robbins & Co., doing business at Cincinnati, all the members thereof being citizens and residents of Cincinnati, for which firm he worked as a drummer, the firm being engaged in the selling of paper and other articles used in the book stores of the stated taxing district. Robbins was arrested for drumming in the district without a license. There was judgment against Robbins, and on appeal it was affirmed by the supreme court of Tennessee, from which court the case was carried to the supreme court of the United States, where the judgment was reversed, on the ground that the legislation, in so far as it applied to cases like that under consideration, was a regulation of commerce among the states, and unconstitutional. In *Ficklen v. Shelby County Taxing Dist.*, 145 U. S. 1, Ficklen and Cooper & Co. were respectively commercial agents or brokers, having an office in the district, and in 1887 took out licenses for their said business under a statute of Tennessee, which provided that "every person or firm dealing in cotton, or any other article whatever, whether as factor, broker, buyer, or seller, on commission or otherwise, \$50 per annum, and, in addition, every such person or firm shall be taxed, *ad valorem*, ten cents on ¹⁸⁸ every hundred dollars of amount of capital invested or used in such business. . . . And, provided further, that if the person or persons taxed in this subsection have no capital invested, they shall pay two and one-half per cent on their gross

year commissions, charges, or compensation for said business, and at the time of taking out said license they shall give bond to return said gross commissions, charges, or compensation to the trustee at the end of the year, and at the end of the year they shall make return to said trustee accordingly, and pay him the said two and one-half per cent." During the year for which they took out licenses all the sales negotiated by Ficklen were made on behalf of principals residing in other states, and the goods so sold were, at the time of the sale, in other states, to be shipped to Tennessee as sales should be effected. During the same time at least nine-tenths of the commissions of Cooper & Co. were derived from similar sales. They had no capital invested in their business. At the expiration of the stated year they applied for a renewal of their license for 1888, tendering each the tax and fee therefor, but, as they had made no return of their commissions, and no payment of the percentage on their commissions, the application was denied. Thereupon, they filed a bill to restrain the collection of the percentage tax for the past year, and also to restrain any interference with their current business, claiming that the tax was a tax on interstate commerce. The supreme court of the United States held that if the tax could be said to affect interstate commerce in any way it did so incidentally, and so remotely as not to amount to regulation of it; and that, under the circumstances, the complainants could not resort to the court simply on the ground that the authorities had refused to issue a new license without the payment of the stipulated ¹⁸⁹ tax. Speaking here for all the court, except Harlan, J., who dissented, there being, however, one vacancy, Chief Justice Fuller said of *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, that the question involved there was, in the language of Judge Bradley, who wrote the opinion of the court, "whether it is competent for a state to levy a tax, or impose any other restrictions upon the citizens or inhabitants of any other state for selling, or seeking to sell, their goods in said state before they are introduced therein"; and that it was decided that it was not, yet that it was conceded that commerce among the states might be legitimately incidentally affected by state laws, when they, among other things, provided "for the imposition of taxes upon persons residing within the state, or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some

other employment or business exercised under authority of the constitution and laws of the United States." That in Robbins' case the tax was held, in effect, not to be a tax on him, but on his principals, while in the Ficklen case it was clearly levied upon the parties in respect of the general commission business they conducted, and their property engaged therein, or their profits realized therefrom. "No doubt," he further says, "can be entertained of a right of a state legislature to tax trades, professions, and occupations, in the absence of inhibition in the state constitution, and where a resident citizen engages in general business, subject to a particular tax, the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and nonresident merchants, of goods situated in another state, does not necessarily involve the taxation ¹⁹⁰ of interstate commerce, forbidden by the constitution." Referring to what was said in *Lyng v. Michigan*, 135 U. S. 161, 166, he observes: "But here the tax is not laid on the occupation or business of carrying on interstate commerce, or exacted as a condition of doing any particular commission business, and that the complainants voluntarily subjected themselves thereto in order to do a general business." And as to *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, where an annual license fee was imposed on a ferry company by the city of East St. Louis, Illinois, the company having been chartered by that state, and being domiciled in the city, but its boats plying between there and St. Louis, Missouri, he quotes from the opinion therein as follows: "The exaction of a license fee is an ordinary exercise of the police power by municipal corporations. When, therefore, a state expressly grants to an incorporated city, as in this case, the power to 'license, tax, and regulate ferries,' the latter may impose a license tax on the keepers of ferries, although their boats ply between lands lying in two different states, and the act by which this exaction is authorized will not be held to be a regulation of commerce." And of *McCall v. California*, 136 U. S. 104, he says that the decision was because the business of the agency was carried on with the purpose to assist in increasing the amount of passenger traffic over the road, and was therefore a part of the commerce of the road, and hence of interstate commerce. And of *Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S. 326, he remarks that the specific gross receipts were taxed as such, taxed "not only because they are money, or its value,

but because they were received for transportation.” Referring to *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, he says: Since a railroad company ¹⁹¹ engaged in interstate commerce is liable to pay an excise tax according to the value of the business done in the state, ascertained as it was there, it is difficult to see why a citizen doing a general business at the place of his domicile should escape payment of his share of the burdens of municipal government because the amount of his tax is arrived at by reference to his profits. “This tax is not on the goods, . . . nor on nonresident merchants, and if it can be said to affect interstate commerce in any way it is incidentally, and so remotely as not to amount to a regulation of such commerce. . . . What position they would have occupied if they had not undertaken to do a general commission business, and had taken out no license therefor, but had simply transacted business for nonresident principals, is an entirely different question, which does not arise on this record.”

The present case is also clearly distinguishable from *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, where a Tennessee statute imposing a privilege tax of \$50 per annum on every sleeping-car or coach used or run over a railroad in that state, and not owned by the railroad on which it should be run or used, was held void, in so far as it applied to interstate transportation of passengers carried over railroads in Tennessee into, or out of, or across, that state in sleeping-cars owned by a corporation of another state, and leased by it for transportation purposes to Tennessee railroad corporations, the latter receiving the transit fare, and the former the compensation for the sleeping accommodations. In the opinion it is said: “The car was equally a vehicle of transit as if it had been a car owned by the railroad company, and the special conveniences or comforts furnished to the passenger had been furnished by the railroad company itself. As such vehicle of transit, ¹⁹² the car, so far as it was engaged in interstate commerce, was not taxable by the state of Tennessee, because the plaintiff had no domicile in Tennessee, and was not subject to its jurisdiction for purposes of taxation, and the cars had no *situs* within the state for purposes of taxation, and the plaintiff carried on no business within the state in the sense in which the carrying on of business in a state is taxable by way of license or privilege.” Here the express company has, as is well known, its local officers and local agents through-

out the state, and is doing business as personally here, and enjoying the protection of our government and laws over that business as much as any person in the state.

The statute now before us is clearly distinguishable from those involved in many of the preceding decisions. It does not impose any tax upon the value of the property of the company within the state, assessed either upon the principle adopted by the legislatures of Massachusetts and Pennsylvania in the cases of *Western Union Tel. Co. v. Attorney General*, 125 U. S. 530, and *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, or otherwise. Nor does it impose a tax on the mere right to exercise within the state a corporate franchise, estimating the value of such use, as in *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217. Again, it is not a tax on a corporation for merely having an office in the state for the use of its officers, stockholders, agents, or employees, as in *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, in all of which cases the statutes were sustained; nor one where the state had given exclusive right to a domestic corporation, and the question of the validity of that grant to the exclusion of another company which the act of Congress gave the right to enter the same territory, and constituted a federal agency, as in *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, where the efficiency of the state grant to exclude the latter company was denied. Our statute is clearly one in which the tax is imposed on the person, and for doing the business of an express company. It is an occupational tax, and is not imposed on any corporation because it is a corporation, or for exercising its corporate franchise within the state, but it is imposed, as are most of the occupational taxes to be found in the act, on any and every person, whether natural or artificial, who may do the express business, and simply because of doing such business. It is, moreover, entirely clear that the statute does not anywhere show any intent to tax interstate or foreign commerce as such, or to tax any one because of doing business that constitutes interstate or foreign commerce, as contradistinguished from local business. That a state cannot tax interstate commerce, either directly or otherwise, or that it cannot make the payment of a tax, or the taking out of a license, a condition precedent to carrying on interstate commerce, we do not deny; nor do we wish to be understood as meaning that a state tax which, in effect, burdens such commerce wherever it

may be carried on, although not laid directly or expressly on interstate commerce, is not offensive to the commerce clause of the constitution, still we do believe that a state tax imposed on any avocation generally, such as those usually imposed on merchants, druggists, dealers in tobacco, and others, for doing business in the state, is not itself, nor is the statute imposing it, unconstitutional. That the commerce clause of the constitution exempts from the burden of state taxation those who confine themselves to interstate commerce is a truth of which, at this day, knowledge must be imputed¹⁹⁴ to the law-making power of the states, and, in the absence of language that clearly connects such an intent with that power, it should not be held that there was a purpose to ignore such truth or violate its principles; but that the doing of express or other business which constitutes interstate commerce, along with and as a part of a general business, which is also made up in part of business of the same nature that is local to the state, exempts those engaged in such general business from the tax which the law imposes upon it, we do not admit. Of course, where such statutes make the payment of the tax or the taking out of a license a condition precedent to such general business, they are never a bar to any one, at any time, entering upon or doing interstate commerce business, and as long as any one does only such business he is exempted by the commerce clause from the effect of the statute, and is, in our judgment, placed beyond the intent of the mere general language usually adopted in imposing occupational taxes; but when he does not confine himself to such business, but engages indiscriminately in local and interstate business, he cannot, by making the former a feature of that business, relieve himself from the taxes, conditions, or regulations to which the latter subjects him. Engaging in the former business does not necessitate his engaging in the latter, and if he does not engage in the latter the former is in no wise burdened, or even affected, by the tax or the statute, but, on the contrary, he is as free to carry on interstate commerce, unaffected by the provisions of this act, as if it was not on the statute book. He may, if he chooses, keep his local and interstate business entirely distinct, or carry them on each as a separate business, and if he does so, the former will be subject to state taxation and regulation, but the latter will be¹⁹⁵ exempt from any legislation regulating or burdening the former. In our judgment, it was

never the purpose of the commerce clause to interfere with state taxation, or state regulation of taxation, so long as any regulation of interstate or foreign commerce, or commerce with the Indian tribes, is not interfered with.

It is obvious from several of the decisions cited above that there is a clear distinction between the unconstitutionality of a statute as such, or of a specific provision thereof, tested by the commerce clause, and the application of a general provision like that before us, of a statute to interstate commerce business; which, but for the commerce clause, would be within the operation of such general provision. This is illustrated by the case of the Pembina Mining Company, and that of the Norfolk and Western Railroad Company, involving the Pennsylvania statute as to foreign corporations having offices in the state for the use of officers and others. In the former of these cases, where the imposition of the tax was sustained, it was said, and is evident, that the statute proposed no prohibition upon the transportation of the products of the corporation or upon their sale in the state, nor is there in the statute any thing that shows an intent to affect interstate commerce as such in any way, but when it was attempted to subject to that statute a company which was using its offices solely for interstate commerce purposes, and the state court had decided both that the statute applied to offices so used and that the tax as thus applied was not contrary to the commerce clause the supreme court reversed the decision, and held that, as so applied, the tax was unconstitutional. Again, in the McCall case, where it is made prominent that the business of the agent was exclusively interstate in its character, it is entirely plain that it was not the ¹⁹⁶ meaning of the court that the statute or ordinance involved in these cases did not stand in full force and effect as to every thing, except interstate or other commerce, falling within the terms of the commercial clause. And in the case of *Western Union Tel. Co. v. Texas*, 105 U. S. 460, where telegrams sent between persons in Texas and those in other states and those sent to government officers were held to be exempted from the general provision of the act taxing all messages, the former because they were interstate commerce, and the latter because of the character of the company as a governmental agency, it is apparent that telegrams themselves were the subject of taxation by the terms of the act, and those which were held to be exempt were purely interstate or governmental in their

character. Again, it is shown in the Shelby County Taxing District cases. In one of them (Robbins' case) the facts showed nothing but interstate commerce business pure and simple, there being not a fact in it that makes the decision authority beyond the inability to tax such commerce as such. Of course, no one would pretend to say that it committed the court to the view that in the doing of a general business of a particular character, composed of both interstate and local commerce, the former component would relieve the entire business from a state tax or regulation to which it would be subject if there was no such component, or that the act was not entirely effectual, except as to business covered by the commerce clause. In the Ficklen case, however, the tax was, as it was imposed by the statute, as general as it was in the Robbins case, and yet because the parties had submitted themselves to the statute as persons intending to do a general business, or, in other words, one indiscriminate as to local or interstate commerce, it was ¹⁹⁷ held that they could not, either because in the one case only interstate business was done, and in the other mostly such business, and only one-tenth of local business, evade the provisions of the statute. We do not understand any case to hold that the protection of the commerce clause is confined to citizens of other states than that whose legislation is complained of. It is as much a shield to the Floridian who in Florida is doing such business with those in other states as it is to the Georgian residing in Georgia, who may be engaging in business with residents of Florida; the protection is to all interstate commerce.

We are not unmindful of the seeming conflict to these views to be found in the expressions embodied in the *Leloup* and the *Crutcher* cases, but our judgment is that those expressions are to be viewed with reference to the circumstances under which the supreme court of the United States was then speaking. The state courts which it was reviewing had each declared, in effect, that these statutes were binding upon and effectual as to companies as doers of interstate business, or, in other words, were a bar to their doing interstate business without having complied with their requirements: *Port of Mobile v. Leloup*, 76 Ala. 401; *Crutcher v. Commonwealth*, 89 Ky. 7. This construction has become, in so far as the federal tribunals were concerned, binding upon the federal court as to the effect of each statute within the

state enacting it, as much as if it had been expressly stated in the act: *Pullman Car Co. v. Pennsylvania*, 141 U. S. 18, 21. This being so, the doing of local business could not affect the question. It gave to the statute the same effect on interstate commerce as if it had had a special clause as to such commerce, like the first clause of the Alabama statute in the case of *Osborne* ¹⁹⁸ v. *Mobile*, 16 Wall. 479, which decision we regard, in view of that clause, as entirely overthrown by the subsequent decisions of the same tribunal. It cannot be, where the state statute does not interfere with interstate commerce, but it can be carried on, protected by the state courts against regulation or interference by state authority, that the mere fact that state commerce, if carried on, is regulated or burdened, operates as a regulation of, or burden on, interstate commerce.

It is not to be doubted that, under our statute, any citizen of the state, or of any other state, or any body corporate of either, that should enter upon the express business in this state, proposing to confine itself to local or state business, or actually doing so, would be subject to all the provisions of this statute; and we cannot see how it can be that an engagement by any such person, natural or artificial, in local business can be relieved from the provisions of the statute by an engagement at the same time in interstate commerce business, or how his engagement in the latter business can make the statute inapplicable to the other. Is it true that the merchant, who may be doing a large local business, can exempt himself from the statute by the fact that he may also do a regular business with customers in other states, to whom he sells and ships goods? We do not think that any thing but interstate and foreign business, or business with the Indian tribes, is protected by the clause in question, or that that clause is the basis either for interfering with a state's dominion over its own commerce or for prescribing the mere form of its legislation as to its affairs.

Our state statute can have no effect as to any interstate or foreign commerce business which may be carried ¹⁹⁹ on by the Southern Express Company, the principal of the plaintiff in error, or by him as its agent, or in fact by any one. So long as he and the company confine their operations to express business, constituting interstate or foreign commerce, they are exempt from any interference with them under state legislation. Such commerce is the subject of federal regula-

tion, and is beyond the jurisdiction of state authority. That the Southern Express Company is engaged in such commerce is admitted, and that it is engaged in domestic or state commerce is also admitted; and nothing is clearer than that the right to engage in interstate or foreign commerce, freed from any regulation or burden of the same by the states, gives no immunity from state regulation or state taxation of state commerce. The exclusion of state interference in the one case is no more perfect nor any more essential than the exclusion of federal interference in the other. In our judgment the Florida statute now under consideration is, in so far as its terms can be construed to apply to interstate or foreign commerce, of no effect; and besides this, there is in the act, in so far as it applies to express companies, nothing that necessarily regulates, or that burdens or interferes with any thing that is strictly interstate or foreign commerce, or that, in view of the commerce clause of the federal constitution, should or can properly be construed to apply to interstate or foreign commerce. Any person or persons, or body corporate, wishing to engage in the express business, and confine that business to interstate or foreign commerce, can do so, and any effort to apply to or enforce against him the provisions of the statute, as to license, license tax, or license fee, must prove futile. The commerce clause of the constitution of the United States protects him ²⁰⁰ against any such interference. But because such person or persons, or body corporate, may have this right, he or they have not, as an incident to it, the right to engage in state commerce, and the statute, as a regulation of state commerce, is entirely valid. It is a legal regulation of state commerce, and there is nothing in the federal constitution that exempts any person or persons, natural or artificial, from its provisions.

If the person engaging or proposing to engage in interstate commerce express business finds that to engage in express business which is state commerce will or may take some of his interstate commerce express earnings to pay the license taxes and fees of the state commerce business, he has only to refrain from the latter business to avoid incurring such exaction from such earnings. It is undeniable that taxes on property employed in interstate commerce business do not constitute a regulation of such commerce: *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217; *Western Union Tel. Co. v. Attorney General*, 125 U. S. 530; *Pullman Palace Car Co.*

v. *Pennsylvania*, 141 U. S. 18. And this must be true, notwithstanding that the payment of such taxes cannot be met from the earnings of state or local commerce. It is not sufficient, to constitute a regulation of such commerce, that the thing complained of affects it indirectly, incidentally, and remotely: *Sherlock v. Alling*, 93 U. S. 99, 102; *Smith v. Alabama*, 124 U. S. 465; *Railroad Co. v. Peniston*, 18 Wall. 5, 30, 31.

2. We fail to discover any uncertainty or obscurity in the statute as to the sums required by it to be paid by express companies as a state license tax, or, we may add, as a county, or a city, or town license tax. The obvious meaning of the act, in so far as its provisions relate to these companies, is that each company shall ²⁰¹ pay a state license tax, and take out a state license, when it proposes to do business in any city, or town, or village having more than 50 inhabitants; the amount of such state license tax being \$200 for cities of 15,000 or more inhabitants, and \$100 for cities of from 10,000 to 15,000 inhabitants, \$75 for cities of from 5,000 to 10,000, \$50 for those of from 3,000 to 5,000, \$25 for those of from 1,000 to 3,000, and \$10 for towns and villages of more than 50 inhabitants. Where there are in one county several cities or towns or villages belonging to one or more of these classes, the company must take out a separate state license for each one of them that it may intend to do business in, and pay the tax and fee for the same as stated. It of course takes out no license for any city, town, or village that it does not do business in. Any county may impose on a company doing business within its limits a license tax of not more than 50 per cent of the state tax, and thus require the company to pay it not more than 50 per cent of the amount such company has to pay to the state as a license tax for doing business at any city, town, or village, within the provisions of the act. If one company is doing business in, say, three places, one of which belongs to one class, another to another class, and the third to still another, the county may impose a tax on the company for each of the three places, not exceeding 50 per cent of the amount of the state tax for that place. Likewise, any incorporated city or town may impose on any such company doing business within its limits a municipal license tax not exceeding 50 per cent of the state license tax imposed upon it for that place by the statute. Whether or not this construction of the statute will result in

rendering it impossible for express companies ²⁰² to carry on within our borders business that is local to the state is a consideration for the law-making power, but it cannot be invoked properly to influence a construction that is contrary to the plain meaning of the statute, made more palpable still by a comparison of it with former legislation as to the same matter: Acts 1872, p. 37; Acts 1881, p. 26; Acts 1891, p. 8. By the legislation cited, the tax was imposed first on the agents, and afterwards changed to the companies, the tax on the companies being confined to simply a state tax, payable to the state treasurer, without any license from collectors of revenue, or any county or municipal taxation under the general provisions of the license tax section of the statutes; while now the state tax is payable to the collectors of revenue, and the license is signed and delivered according to the general provisions of the ninth section of the revenue law of 1893, just as in the cases of many others, if not all, the occupations made subject to license by that section, its county and municipal taxation features being likewise applicable to these companies, just as they are to merchants, keepers of hotels, liquor dealers, and banks, and others too numerous to designate, Upon most deliberate consideration we are satisfied beyond doubt that any other construction of the act on this point would be strained and inconsistent, and contrary to its meaning and the manifest purpose exhibited by the statute. The amount of the tax, if not a matter solely of legislative discretion, is still not shown by this record to be prohibitory or destructive of business; and if there be one or more counties in the state in which there is not even a village of 50 inhabitants, the fact does not bring the act in conflict with any provision of our constitution, nor does it impair the uniform operation of the act throughout the state as ²⁰³ to all persons standing in the situation which the act makes the test of taxation. The question of the population of any city, town, or village has, as the petition shows, presented no insuperable difficulty to petitioner or his counsel, nor, as is shown by the stipulation between counsel, any to the state authorities; and when it shall be made an issue it will be one of fact, and not beyond the power of the courts to deal with successfully; and it is entirely clear, from the case before us, that the law affords a hearing as to the enforcement of the criminal features of the statutes, and it would be improper to intimate any opinion

as to its provisions that give resort to levy and sale of property when no such levy has been made.

It cannot be said that the detention of the plaintiff in error is without jurisdiction, and therefore he could or should have been discharged on *habeas corpus* from the custody in which he was when the writ issued: *Ex Parte Prince*, 27 Fla. 196; 26 Am. St. Rep. 67. The plaintiff in error was properly remanded by the circuit judge for a hearing before the criminal court of record of Duval county upon the charge. That hearing must be conducted on principles consistent with the conclusions we have reached, and particularly with an eye to the fact that our legislation has, and can have, no effect upon interstate commerce, but is applicable alone to state or local business. The Southern Express Company may carry on any and all business that constitutes interstate or foreign commerce, free from regulation by or under our laws; but business strictly of a state or local character cannot be exempted from our laws, or put beyond our authority, by its engaging at the same time in interstate or foreign commerce. ²⁰⁴ The judgment will be affirmed, and the cause remanded for proceedings not inconsistent with this opinion.

INTERSTATE COMMERCE—STATE REGULATION OF—TAXATION OF OCCUPATIONS.—For a thorough discussion of this subject see the monographic note to *People v. Wemple*, 27 Am. St. Rep. 547. See, further, the recent cases of *Commonwealth v. Smith*, 92 Ky. 38; 36 Am. St. Rep. 578; *City of Bloomington v. Bourland*, 137 Ill. 534; 31 Am. St. Rep. 382; and *State v. French*, 109 N. C. 722; 26 Am. St. Rep. 590, with the notes thereto.

JACKSONVILLE, TAMPA, AND KEY WEST RAILWAY COMPANY v. HARRIS.

[33 FLORIDA, 217.]

RAILROADS—LIABILITY FOR KILLING STOCK—NOTICE OF CLAIM.—A letter from an owner to a railroad company notifying it of the killing of his stock by its train, of the time and place of the killing, and requesting to be informed as soon as possible what the company would pay him for the stock, is admissible as evidence of notice and claim for damages under a statute making railroad companies liable for failure to erect and maintain proper fences and guards to exclude stock from their tracks, although such letter fails to state the amount of damage claimed. Another letter stating the amount claimed is also admissible in evidence, although it was not written until some time after the killing, and contained an offer to take less than the owner believed himself

entitled to. The letters together constitute ample notice and presentation of the claim.

RAILROADS—LIABILITY FOR STOCK KILLING—NOTICE OF CLAIM TO AGENT OF COMPANY.—It cannot be assumed, as matter of law, that the general attorney of a railroad is not a general agent or officer thereof for the purpose of notification and presentation of a claim for stock killed by the company, in the absence of any attempt by it to show that he was not such officer or agent, or any objection to proof of demand upon him on the ground that he was not a proper representative of the company.

STATUTES—CONSTRUCTION OF RAILROAD FENCE STATUTE.—In a statute requiring notice of claim of the killing of stock by a railroad company to be given "to any general agent or officer of such corporation or person, or to any station, depot, or other agent or officer acting for such corporation, in the county where such livestock was killed or injured," the words subsequent to the word "officer," where it appears the second time, do not qualify any of the preceding words, except those after the word "person."

RAILROADS—CONSTRUCTION OF FENCE LAW, AND LIABILITY THEREUNDER.—

The general requirement of the Florida railroad fence law is the erection and maintenance, by corporations and persons operating railroads, of substantial fences on both sides of the railroad track, and the fences must be sufficient to exclude all livestock from the road, or at least such stock as is not shown to be breachy, with the limitation that in lieu of fences, stockguards shall be erected and maintained at public crossings, and at such other crossings as may be necessary for the use of owners or tenants of land adjoining a railroad. A failure to maintain such fences or guards makes the company liable for damage by its engines or cars to livestock caused by such failure. Where there is no crossing of the character indicated the duty is to maintain a fence of the character named, and, as between the owner of stock and the company, a gap and bars are regarded as a fence, and must be kept in the condition necessary for excluding and turning stock. If the company has erected a sufficient fence, and it is thrown or broken down without the company's knowledge, or by the act of God, or by strangers, without the company's knowledge or consent, the law accords to the company a reasonable time for ascertaining the fact, and restoring the fence, and if any damage is caused by the fence being thus down before there has been a reasonable time or opportunity for restoring it, after being aware of its being down, or for learning of its being down, and restoring it, the company is not liable, and the same rule applies when bars or gates are left open without the company's knowledge, consent, or fault.

RAILROADS—LIABILITY FOR KILLING STOCK.—When a gap, with bars, in a railroad fence not at a crossing is used with the knowledge of the company by persons hauling and supplying it with wood under contract, and the bars are left down by such persons, and livestock pass through the gap, and are killed by the company's train, the parties so leaving the bars down cannot be regarded as strangers to the company. Their acts must be deemed the acts of the company, and it is liable for the damage resulting to the owner of the stock.

RAILROADS—LIABILITY FOR KILLING STOCK—SUFFICIENCY OF COMPLAINT. A complaint alleging that a railroad company did not maintain fences on the sides of its road sufficient to exclude livestock therefrom, and,

for want of such fences, two horses of plaintiff, without negligence on his part, strayed and went upon the railroad at a certain place not at a crossing, and where such fences were necessary, and were there killed by a certain engine belonging to such company, giving the value of the horses so killed, is good and sufficient as against a motion for arrest of judgment on the ground that the complaint does not show that the damage was caused by a failure to erect and maintain fences or stockguards.

ACTION against a railroad company to recover for stock killed. The declaration alleged that the company did not maintain fences on the sides of its road sufficient to turn or exclude stock therefrom; that for want of such fences two horses of the plaintiff, without fault or negligence on his part, strayed, and went upon the railroad at a certain place where there was no crossing, and where fences were necessary to turn and exclude livestock from the road; that said horses were there killed by a certain engine and cars belonging to said company, and that the value of each horse so killed was two hundred dollars; that more than thirty days prior this action plaintiff gave notice and claim in writing for the damage sustained by the killing of such horses to a general officer of the defendant company, but that it failed to pay such claim for thirty days thereafter, and has ever since failed and refused to pay such claim, or any part thereof. The defendant pleaded not guilty; that it maintained proper fences on the sides of its track at the places named in the declaration; that plaintiff was guilty of contributory negligence; and that it never had been served with notice in writing. The trial resulted in a judgment for plaintiff in the sum of four hundred and sixteen dollars and fifty cents. Defendant appealed. The statute under which the action was brought provides that every railroad company operating a road within the state shall erect and maintain substantial fences on the sides of the road (except through towns and cities, unless they require it) sufficient to turn and exclude all livestock from its railroad, with stockguards at all public or other crossings, as may be necessary for the use of owners or tenants of land adjoining such roads. A failure to maintain such fences and guards renders the company liable for damages done by its engines or cars to any livestock caused by such failure. When livestock is so killed or injured, the person entitled to damages must give notice, and present his claim therefor to any general agent or officer of the company, or to any station, depot, or other agent or offi-

cor acting for the corporation in the county where the livestock was killed, such notice or presentment of claim to be in writing. The failure of the company to pay such claim within thirty days after notice authorizes suit to be brought thereon.

J. R. Parrott and T. M. Day, Jr., for the appellant.

B. M. Miller, for the appellee.

222 RANEY, C. J. The testimony shows that the horses of the plaintiff were killed near a wood-rack about a half mile from his home, and a mile and a half from the town of Seville, and were found there by the plaintiff and the section boss and his hands and others, early in the morning of June 28, 1888, lying on the side of the railroad, and that, as indicated by their tracks, they had walked through a gap in the railroad fence and on to the railroad. The gap was used for hauling in wood for the locomotives by two men named Stephens, who are spoken of by one witness as owning the rack. There was another rack in the same locality owned by another person, but on the opposite side of the gap. There was no railroad crossing at the gap. The plaintiff testifies that the gap was open when the horses were found, and he saw no bars or poles. One witness testified that he had seen bars or poles, about the size of his arm, up at the gap, but did not recollect that any were up when he and plaintiff found the horses on the named day. Another witness says that they were down, and that he had seen the gap the evening before between sunset and dark, and they were down then, he having met the Stephenses coming home just before he got to the gap. The foreman of the section of the road where the horses were killed testified that it was a part of his duty to see that the road and fences were in proper condition, and that he found the horses on the morning stated, and that the bars were opened on the side that the Stephens rack was. That there were three bars provided for the gap, reaching from three and one-half to four feet from the ground. He had found the bars down before this, not knowing who left them 223 down, and had got his men to put them up; that he had warned persons to put them up; thinks he went by the day before the accident at twelve o'clock, and the Stephens boys were in sight with a load of wood for the rack, and the bars were down, but he did not warn them to put them up, yet

had done so before. That the wood-rack men hauling wood for the company were supposed to put up and take down the bars. That he had notified the company that it was a dangerous place; notifying the roadmaster, who "saw that they were kept up," and who went down there and got after these men about it. That witness did not shut the bars every night, as if he had he could not have done much of any thing else; yet that he had them put up when he found them down, and would have done so on the day preceding the accident if he had not seen the cart coming with the load of wood. A section hand stated that he had put up the bars under the section master's direction; that he saw the bars down on the day and under the circumstances stated by the section master, and he never knew them to be left open by the section master, and that the bars were not quite three feet high. The testimony as to the ownership and value of the horses need not be stated.

The first assignment of error is as to the admission in evidence of two letters offered by the plaintiff. One of them is dated July 4, 1888, and is from the plaintiff, the substance of it being that the fast mail train going south on the morning of June 28th killed two horses of the writer near the eighty-six-mile post, and that he was desirous of knowing what the company would pay him for them; that the killing had been reported by the section master; and requesting to be communicated with as early as possible relative to the matter, and to let him know what the company would do in the case. ²²⁴ Here it should be stated that the plaintiff, in testifying as to the killing of the horses and his finding them, said that he gave notice to the railroad company, sent a letter to General Mason, and that they wrote back and offered him eight dollars for the horses. The other letter bears date September 11, 1888, and is from B. M. Miller, Seville, Florida, to J. R. Parrott, attorney for defendant company. It states that Harris has retained him to prosecute his claim against the company for the two horses, killed on June 28, 1888, and that if the company was willing to settle the matter without suit, the plaintiff would take two hundred dollars, in full satisfaction of his claim; and if it would not, the writer was instructed to bring suit at once, and asked for the company's decision at once. The admission of the second letter was objected to on the ground that it was an offer of compromise, and not a notice, but the ground of the objection to the former letter is

not given. The objections were overruled, and the defendant excepted. Waiving, for the purposes of this case, the deficiency of the objection to the letter from Harris, we, in view of the letter from Miller, fail to see in the objection urged here good ground for excluding the letter from Harris. Such objection is that the letter does not set any sum as the amount of the damage, or present his claim. True, it does not state the amount of the claim, yet it presents a claim, and fully discloses the basis of it, and the deficiency as to the amount is fully cured by Miller's letter. The objection to Miller's letter, that it was not written at the time of the killing, is not good, the statute not making this an essential; and the other one, that it is an offer of compromise, is palpably without merit, even if we admit it is an offer to take less than the plaintiff believed himself to be entitled to. The two letters, considered together, constitute ²²⁵ an ample notice and presentation of claims under the statute. Whether, in the absence of Miller's letter, the testimony of the plaintiff, that when he gave notice to the railroad company it wrote back and offered him eight dollars for the horses, would not supply the alleged deficiency of the plaintiff's letter, need not be considered.

The conclusion announced above disposes also of one of the charges requested by the defendant.

The second assignment of error is as to a charge in which the judge used, among others, the expression: "If you find that the plaintiff, after the killing of the horses, gave notice of such killing as required by law, and made presentment of his claim in writing for such killing." The objection urged is, that as there was a question in the case whether or not the notice and claim had been presented to any one of the officers specified in the statute, the jury should have been instructed what the law was, in order that they might pass understandingly on that point. Under the facts of the case, we do not see that the instruction was calculated to mislead the jury. If defendant desired any further instruction they should have asked for it. It cannot be assumed, as a matter of law, that the general attorney of the company, which Mr. Parrott is testified by one of the witnesses to have been, was not a general agent or officer of the company within the meaning of the act, or that General Mason, to whom it must be concluded the letter from the plaintiff was written, was not a proper officer or agent, within the meaning of the

act, to give notice to: *Indianapolis etc. R. R. Co. v. Truitt*, 24 Ind. 162. In the absence of any attempt upon the ²²⁶ part of the company to show that Parrott was not an officer or agent of the company for the purposes of notice and demand under the act, the jury were justified in concluding that he was such an officer or agent. The conduct of the company in the premises is at least a tacit admission that he was; the notice to Mason was recognized by the company, in its offer of eight dollars, as having been given to a proper representative, and no objection to proof of demand upon Parrott was made on the ground that he was not a proper representative of the company.

Another charge requested by the defendant, and properly refused, may be disposed of by saying of the provision of the statute requiring notice of claim to be given "to any general agent or officer of such corporation, or person, or to any station, depot, or other agent or officer acting for said corporation in the county where said livestock was killed or injured," that the words subsequent to the word "officer," where it appears the second time, do not qualify any of the preceding words except those after the word "person."

An instruction requested by the defendant, and the refusal of which is made the basis of an assignment of error, is: "If you find that the cause of the presence of the plaintiff's horses on the defendant's railroad track was the negligence of persons, not the agents or servants of the defendant, in leaving down the bars provided by the defendant to close an opening in the fence, and that the defendant, its agents, and servants were not guilty of negligence in failing to replace the bars, you will find for the defendant."

A disposal of this point requires some observations upon the nature of the statute. The general requirement of the act is the erection and maintenance, by corporations and persons operating railroads in our ²²⁷ state, of substantial fences on both sides of the railroads, and the fences must be sufficient to exclude or turn all livestock from the roads, or at least such stock as are orderly, or not shown to be breachy. This requirement is not applicable in cities or towns unless they make it so. There is a limitation upon the general requirement, even outside of cities and towns, which is that in lieu of fences, stockguards shall be erected and maintained at public crossings, and at such other crossings as may be necessary for the use of owners or tenants of land adjoining a rail-

road. In case of a failure upon the part of a railroad company to erect and maintain a fence of the character indicated, wherever the statute so requires, the company is made liable for all damage by its engines or cars to any livestock, caused by a failure to erect or maintain such a fence. If a failure upon the part of the company to erect or to maintain the fence or stockguard, as the case may be, at a place where the statute contemplates that one or the other shall be maintained, is the true cause of the injury, such neglect of duty makes the company liable. Where there is no public crossing, nor a crossing that is necessary for the use of owners or tenants of lands adjoining a railroad, the duty is to maintain a fence of the character indicated. Here there is no crossing of any kind, and the simple question is, Has such a fence, as the law requires to exempt the railroad company from liability for injury to livestock, been maintained? As between the owner of livestock and the company, the gap and bars are to be regarded as a fence, and the company's measure of duty is not diminished by the existence of the gap and bars. It was at least the duty of the company to maintain the gap and bars in an efficient condition for excluding and ²²⁸ turning livestock from the railroad. These gates, says the opinion in *Chicago etc. Ry. Co. v. Harris*, 54 Ill. 528, speaking of one at a farm crossing, are a part of the fence, and the duty to keep their fences in repair includes the duty of keeping them safely and securely closed, so as to afford equal protection from stock getting upon their roads at such places as at other points. It is true that where a company has erected a sufficient fence, and such fence is thrown or broken down without the company's knowledge, by the act of God, or by strangers without the company's knowledge or consent, the law accords to the company a reasonable time for ascertaining the fact and restoring the fence, and if any damage is caused, by the fence being thus down, before there has been a reasonable opportunity or time for restoring it after being aware of its being down, or for learning of its being down and restoring it, the company will not be liable; and a somewhat similar doctrine is applicable where bars or gates at a crossing are left open without the company's consent or fault: *Harrington v. Chicago etc. R. R. Co.*, 71 Mo. 384; *Clardy v. St. Louis etc. Ry. Co.*, 73 Mo. 576; *Case v. St. Louis etc. R. R. Co.*, 75 Mo. 668; *Walters v. Missouri Pacific Ry. Co.*, 78 Mo. 617; *Rutledge v. Hannibal etc. R. R. Co.*, 78 Mo. 286; *Perry v.*

Dubuque etc. Ry. Co., 36 Iowa, 102; *Aylesworth v. Chicago etc. R. R. Co.*, 30 Iowa, 459; *Henderson v. Chicago etc. R. R. Co.*, 39 Iowa, 220; *Davis v. Chicago etc. R. R. Co.*, 40 Iowa, 292; *Munch v. New York Cent. R. R. Co.*, 29 Barb. 647; *Hodge v. New York Cent. etc. R. R. Co.*, 27 Hun, 394; *Morrison v. New York etc. R. R. Co.*, 32 Barb. 568; *Robinson v. Grand Trunk Ry. Co.*, 32 Mich. 322; *Toledo etc. Ry. Co. v. 229 Eder*, 45 Mich. 329; *Grand Rapids etc. R. R. Co. v. Monroe*, 47 Mich. 152; *Lemon v. Chicago etc. Ry. Co.*, 59 Mich. 618; *Brown v. Milwaukee etc. Ry. Co.*, 21 Wis. 39; 91 Am. Dec. 456; *Goddard v. Chicago etc. Ry. Co.*, 54 Wis. 548; *Illinois Cent. R. R. Co. v. Swearingen*, 47 Ill. 206; *Chicago etc. R. R. Co. v. Saunders*, 85 Ill. 288; *Toledo etc. Ry. Co. v. Daniels*, 21 Ind. 256; *Indianapolis etc. R. R. Co. v. Truitt*, 24 Ind. 162. Here, however, there is no such case; on the contrary, the gap is one which was not only authorized by the company, but also used solely for a purpose or to an end that was essential to the operation of the road. Grant that it is said that the parties who hauled the wood owned the wood-racks, still it is clear that they were furnishing the wood and hauling it in through the gap, and depositing it on the racks close to the track under contract with the company and for its use, and it is apparent from the testimony of the company's employees that the company regarded the keeping of the bars up as a part of the company's duty, and, moreover, was aware that it could not rely on the men engaged in hauling the wood to perform that duty. The leaving of the bars down by these persons, or any of them, while engaged in hauling wood, was not the act of a mere stranger to the company within the meaning of the cases cited above, but was an act done by those who, as between the company and the public, were acting for the company; and the only reasonable inference to be drawn from the testimony is that the bars were left down by these parties the afternoon before the accident, and while hauling wood for the company, and there is no proof, nor can it be assumed, that they ²³⁰ were ever put up after being seen by such agents to be down.

Under a statute of New York, requiring railroad corporations to erect and maintain fences on both sides of their roads, no exception being made or permission given thereby for openings or gates for the use of the corporation or its customers, or the public generally, but only for the use of adjoining proprietors, it was decided in *Spinner v. New York Cent. etc. R. R. Co.*, 67 N. Y. 153, that if the company permits or

acquiesces in the use, in its business, by its customers, of a gate constructed by it at a farm crossing, so that the gate does not serve the end of a fence, it is in default. The gate through which the plaintiff's cattle entered, had for several years been used almost daily in the business of loading and unloading freight, vehicles delivering or taking goods passing in and out thereat; and in this business the company's servants had helped. In consequence, the gate was left open at the close of the day's business, and would be closed in the evening or at midnight by defendant's servants. The adjoining proprietor, for whose use the gate was originally erected, had not used it for six weeks before the accident, and had no knowledge of its use for his purposes on the preceding day. The cattle had escaped from plaintiff's inclosure in the nighttime on to the highway, and thence through the gate, and had got on to the railroad and been killed or injured by a passing train. It was held that the evidence was sufficient to authorize an inference by the jury that the gate was open by reason of its use by defendant's customers during the day, or some day shortly prior; that the defendant had sufficient notice that the gateway had been diverted from its original purpose to a common passageway for its customers, and that it was often ²³¹ left open in consequence thereof; that the opening of it at all, by its assent or acquiescence, was in contravention of the statute, and that if such use of the gate was not of itself sufficient to charge defendant, it was bound to see that, when the use of it for the day was over, it was well closed, and that for a neglect of this duty it was liable. It is said in the opinion, that when the farm-gate is put to the use of the company or its customers, or made subservient to the business of the former, it is not a farm-gate *pro tanto*, but as a panel in the fence taken down by it or them, and, if left open, it is as a panel left fallen down. That it is bound to keep that gate also in good repair, not simply in sound material condition, but in such state as is required for a division fence, or as will turn away cattle from its track. If it permits, invites, and shares in such a use of the gateway as, to its knowledge or notice, results in the gate not serving the end of a fence, it fails in its duty. In effect, the gate is then no longer merely a gate at a farm crossing, for the use alone of an adjoining proprietor, but it has become the fence of the defendant. When it has knowledge or notice that the gate is customarily left open, or when, from the manner of the

use of it, it has notice that such result is likely to happen, it is in statutory default if it does not see to the closing of it, when the use of it is over for the day or other shorter period.

In *Cleveland etc. R. R. Co. v. Swift*, 42 Ind. 119, the railroad had been fenced, but a panel of the fence had been cut out and made into the form of a gate, but not hung on hinges, and the opening was used by persons hauling wood and placing it near the railroad track, and this was done with the consent of the railroad company, or without objection from it, a ²³² subtenant of the plaintiff being one of the persons hauling wood; and while he was so hauling, the gate was so set up that hogs of the plaintiff passed through the opening and upon the railroad, and were killed, and it was held that these facts did not show such negligence on the part of the plaintiff as to prevent his recovery; and that if a railroad company allow an opening to be made in the fence inclosing its road, and left insecure, it cannot be said that the road is securely fenced; and if animals pass through the same and upon the railroad, and are killed, the company is liable without proof of negligence on the part of the company: See, also, *Laude v. Chicago etc. Ry. Co.*, 33 Wis. 640; *Indianapolis etc. R. R. Co. v. Logan*, 19 Ind. 294; *Illinois Cent. R. R. Co. v. Arnold*, 47 Ill. 173; *Chicago etc. Ry. Co. v. Harris*, 54 Ill. 528.

It could not be inferred, at all reasonably, from the evidence that the bars were left down by any one but the men who were shown to have been engaged in hauling wood, and this being so, and those men, according to the principles governing the case, not being strangers to the company, there was no error in refusing the instruction. Considering the character of the testimony just referred to, the instruction was more or less irrelevant, and was calculated to mislead the jury, if not accompanied by a qualification excluding the idea that those hauling wood are not such strangers. The judge, among other instructions, told the jury that a railroad company is not liable for horses killed by its trains, unless it was negligent, or failed to erect and maintain proper fences and stockguards, and that the burden was upon the plaintiff to show that the company did not maintain fences sufficient to exclude and turn livestock.

²³³ The declaration is sufficient against the objection that it does not show that the damage was caused by a failure to erect or maintain said fences or stockguards, and the motion in arrest of judgment was properly denied; and the other

assignments of error, in so far as they merit notice, are disposed of by what has been said.

The judgment is affirmed.

RAILROADS—KILLING STOCK—SUFFICIENT DEMAND FOR DAMAGES.—

Where the owner of an animal killed by a railroad in the operation of its trains makes out a bill in writing, stating an account in favor of himself against the company for the value of the animal killed, giving the date of the accident, and presents said bill to the company within thirty days from the date of the accident, this was held a sufficient demand upon the company in an action to recover the value of the animal: *Fort Scott etc. R. R. Co. v. Holman*, 45 Kan. 167.

RAILROADS—KILLING STOCK—LIABILITY FOR NOT MAINTAINING FENCES:

See the notes to *Missouri Pac. Ry. Co. v. Gedney*, 21 Am. St. Rep. 289; *Memphis etc. R. R. Co. v. Kerr*, 20 Am. St. Rep. 162, and the extended notes to *Tonawanda R. R. Co. v. Munger*, 49 Am. Dec. 268. A railroad is liable for injuries occasioned by a failure to erect and maintain substantial, legal, and sufficient fences on each side of their tracks where this duty is imposed upon them by law: *Whitney v. Atlantic etc. R. R. Co.*, 44 Me. 362; 69 Am. Dec. 103, and note; *Gorman v. Pacific R. R.*, 26 Mo. 441; 72 Am. Dec. 220, and note; *Browne v. Providence etc. R. R. Co.*, 12 Gray, 55; 71 Am. Dec. 736, and note; *Congdon v. Central Vermont R. R. Co.*, 56 Vt. 390; 48 Am. Rep. 793, and note; *Missouri Pac. Ry. Co. v. Baxter*, 45 Kan. 520; *Dacres v. Oregon Ry. etc. Co.*, 1 Wash. 525; *Heller v. Abbott*, 79 Wis. 409; *Oregon Ry. etc. Co. v. Dacres*, 1 Wash. 195.

A RAILROAD IS LIABLE FOR A SERVANT'S NEGLIGENCE in leaving a fence open, whereby the plaintiff's horses escaped and were injured by a passing train, though the servant was a day laborer, and his act was done at night, and not in the business of the company: *Chapman v. New York etc. R. R. Co.*, 33 N. Y. 369; 88 Am. Dec. 392.

RAILROADS—KILLING STOCK—NOTICE OF DEFECT IN FENCES.—

If a railroad fence is suddenly destroyed by some accident against which the company could not provide, it may be that the company would not be subject to the absolute liability of the statute if immediate steps were taken to rebuild: *Brown v. Milwaukee etc. Ry. Co.*, 21 Wis. 39; 91 Am. Dec. 456. A railroad bound to keep fences along its road in repair, after a portion of the same has been down for several days, is presumed to have had notice of the fact: *Norris v. Androscoggin R. R. Co.*, 39 Me. 273; 63 Am. Dec. 621, and note. In an action against a railroad for damages caused by its fence being out of order, evidence that its condition was defective two months is admissible to show that its condition was, or ought to have been, known to the company: *Brown v. Milwaukee etc. Ry. Co.*, 21 Wis. 39; 91 Am. Dec. 456. See, further, the note to *Antisdel v. Chicago etc. Ry. Co.*, 7 Am. Rep. 47.

WATROUS v. MORRISON.

[33 FLORIDA, 261.]

BOUNDARIES—SURVEY, WHEN CONTROLS.—In the sale of lands in sections, or subdivisions thereof, including lots, according to the government survey, the survey as actually made controls, if the monuments, corners, or lines actually established can be located or proved. Courses and distances yield to such corners and lines.

BOUNDARIES—AGREEMENT CONCERNING—BINDING, EFFECT OF.—While the title to real estate cannot be transferred by verbal agreement, yet, if the boundary between contiguous lands is uncertain and disputed, the owners of such lands may agree upon a certain line as a permanent boundary line; and if the agreement is followed by actual occupation, according to such line as the boundary, the line is binding upon them and their successors in title as the boundary. Such line becomes binding, not upon the principle that the title to real estate can be passed by parol, but for the reason that the proprietors have, by such consent and conduct, agreed permanently upon the limits, or the extent, of their respective lands or property.

BOUNDARIES—ADVERSE POSSESSION.—In cases of mistake as to the true boundary line between adjoining lands, the real test, as to whether or not a title is acquired by a holding for the period of the statute of limitations, is the intention of the party holding beyond the true line. If such occupation is by mere mistake, with no intention on the part of the occupant to claim, as his own, land which does not belong to him, but he intends to hold only to the true line, wherever it may be, the holding is not adverse. If, however, the occupant takes possession, believing the land to be his up to the mistaken line, and claiming title to it, so holds, the holding is adverse. The intent to claim title up to the line is an indispensable element of adverse holding; the claim of right must be as broad as the possession. Simple acquiescence, or lying by without objection for the statutory period, in case of such adverse holding, binds the party so lying by to the line, though not the true line.

EJECTMENT—ADVERSE POSSESSION—OPINION EVIDENCE.—A party to an action of ejectment cannot testify that he has been in open, notorious, and actual possession of the disputed land. Such evidence calls for the mere opinion of the witness on a material issue of fact, which it is the province of the jury to decide under proper instructions from the court.

PRACTICE—EVIDENCE.—The exclusion, on an erroneous ground, of a question is entirely immaterial when the bill of exceptions shows that the witness has, without objection, both before and after such exclusion, testified fully as to the point covered by such question.

EJECTMENT—EVIDENCE.—A question put to a party in ejectment, testifying in his own behalf as to whether or not he has ever admitted that the land in dispute did not belong to him, is properly excluded. Whatever in the nature of such an admission may have passed between such party and any one else is admissible to be proved by either party in the proper way, and, whatever may be testified to as having so passed, can be denied by either party, or explained by him by a statement of his recollection of what, if any thing, passed; but his opinion as to whether it constituted an admission is properly excluded from the jury.

EJECTMENT—EVIDENCE OF BOUNDARY LINE.—In ejectment the defendant may testify as to a conversation had with the husband of the then owner of the land in dispute, in reference to the boundary line thereof, as such conversation may tend to show an intention on the part of the defendant to claim the land as his own up to the line to which he holds exclusive of any other right, and independent of such line being the true line.

EJECTMENT—EVIDENCE OF BOUNDARY.—A party in ejectment may testify as to his knowledge of any objection made by a deceased prior owner of the opposing party's title to a stated line as the boundary line of the land in dispute.

BOUNDARIES BY AGREEMENT—ADVERSE POSSESSION.—If, when parties in ejectment became the owners in fee of the land in dispute, there has not been established a true line or boundary between them, nor such an adverse holding by the defendant as is necessary to perfect his right under the statute of adverse claim up to that time, and they then agree to have the true boundary established by a survey, and to abide thereby, the jury may find that defendant's claim or holding was only intended to be to the true line, wherever it might be when legally established by proper methods.

ADVERSE POSSESSION.—“NOTORIOUS,” as used in defining an adverse holding, means that the possession or character of the holding possesses such elements of notoriety that the owner may be presumed to have notice of it and of its extent. To declare to the jury that the adverse holding must be asserted at all times and in all places, whenever necessary to make such claim generally known and understood, is calculated to mislead, by leaving it to the jury to decide at what times and places it is necessary to make such claim generally known and understood.

BOUNDARIES BY AGREEMENT—WHO BOUND BY.—A nonconsenting owner is not bound by an agreement of the other owners as to a boundary line between adjoining lands, nor is any stranger thereto bound who may claim under such nonconsenting owner, but should a consenting owner afterwards become the owner of the entire tract in which he was interested, or of a distinct part of it, and continue to recognize the boundary line previously agreed and acted on by him and the owner of the adjoining land, such line is binding on him to the extent of his several ownership.

BOUNDARIES BY AGREEMENT.—An agreement to settle an uncertain or disputed boundary line need not be made if the line is run. Parties may agree orally to have an uncertain or disputed line run, and that it shall be the controlling line, and if they afterwards treat it as the permanent dividing line, by improving up to it, or otherwise, they are confined to that line.

BOUNDARIES.—IN ADVERSE CLAIMS OF PREMISES lying upon an unsettled boundary the claim must be open, notorious, and continued, and must be asserted at all times in conversations between the parties in relation to such boundary.

BOUNDARIES BY AGREEMENT—ESTOPPEL.—An agreement between owners of adjoining lands to employ a common agent or surveyor to run a line and set up a boundary between them, when the dividing line is susceptible of being correctly located, does not estop either party, or their grantees, from showing an error in such line.

BOUNDARIES—ADVERSE POSSESSION.—Possession by one coterminous owner may have been taken purely by mistake, but may have been held after-

wards adversely to any right of the adjoining proprietor or any other person, intentionally, avowedly, openly, and continuously. When at the time of a conveyance the holding or possession was by mistake, and without intention to claim independently of the correctness or error of the line held up to, the conveyance is not void, as the holding is not adverse. When the holding is with the intention to claim the land adversely, independent of the correctness or error of the boundary line, and the claim of title and the possession are of a character to render the possession adverse to the true line within the meaning of the statute of limitations, a conveyance by the disseisee is void as against the disseisor as to such of the land as was so occupied at the time of the conveyance.

PRACTICE—INSTRUCTIONS.—A statement in a motion for a new trial as embodied in a bill of exceptions, to the effect that the court erred in refusing to give certain instructions, is not proper evidence that they were duly presented to the trial judge, and such instructions cannot be considered on appeal.

J. B. Wall, for the appellant.

H. C. Macfarlane, and *Sparkman and Sparkman*, for the appellee.

265 *RANEY, C. J.* This is an action of ejectment instituted June 22, 1885 (Rev. Stats., sec. 1282), by Morrison against Watrous, and in which the controversy is as to the boundary line between lots 1 and 2, township 29, range 18, south and east, such lots being in Hillsborough county, and riparian to Hillsborough bay, now frequently, if not usually, called Tampa bay.

Morrison deraigns title to lot 1 from the trustees of the Internal Improvement Fund of Florida, who conveyed it in April, 1875, to Mrs. Sarah C. Taylor, she being the wife of John M. Taylor. Afterwards, on March 14, 1876, Mrs. Taylor and her husband conveyed an undivided interest therein to James E. Lipscomb, who, according to the testimony of Mr. Taylor, was interested originally to this extent in the purchase from such trustees; and subsequently, Mrs. Taylor and Mr. Lipscomb made partition of the lot between themselves, she taking the southern portion, containing thirty-three acres, more or less, and he the remainder or northern portion of the lot, such northern portion having a western boundary of thirteen chains, and containing forty acres, more or less; the deed to her bearing date June 18, 1877, and that to him the twenty-second day of the same month. On April 16, 1878, Lipscomb **266** and wife conveyed the former's portion to Morrison, and on the tenth day of October following Taylor and wife conveyed Mrs. Taylor's portion to him.

Watrous derails title to lot 2 from the United States in this wise: Harriet C. Chase conveyed by deed dated December 5, 1875, with covenants of general warranty, to Spranger and Lang, and they on March 1, 1876, conveyed to Watrous by deed containing similar covenants; and on July 13, 1885, a patent to Harriet C. Chase, widow of Samuel C. Chase, for the land was issued by the United States, it reciting that she had paid for the land under the act of Congress of April 24, 1820.

The *locus in quo*, which Morrison sues to recover, is a piece of land seeming to be nearly rectangular in shape, and containing four and ninety-seven one hundredths acres. According to Morrison's contention, it is a part of lot 1, lying in the extreme western part thereof, and extending the whole length of the lot, north and south, he relying on a survey made by C. E. Worth in July, 1884. According to the position taken by Watrous, the land contended for is in the extreme eastern part of lot 2, extending the whole length thereof, north and south, he relying more particularly on a survey made by W. F. White in the year 1876. Watrous claims to have been in adverse possession up to the White line since 1878; Morrison, on the contrary, contending that whatever possession Watrous had was not adverse to Morrison or to the title under which he claims. The verdict was for the plaintiff, but without mesne profits. Watrous has appealed from the judgment.

In the sale of lands in sections, or subdivisions thereof, including lots, according to the government survey, the survey as actually made controls: *Miller* 267 v. *White*, 23 Fla. 301; *Liddon v. Hodnett*, 22 Fla. 442. It is the survey as it was actually run on the ground that governs, if the monuments, corners, or lines actually established can be located or proved. Courses and distances yield to such corners and lines, so long as the latter can be located, and for the reason that the latter are the fact or truth of the survey as it was actually made, while the former are but descriptions of the act done, and when inaccurate they cannot change the fact: *McClintock v. Rogers*, 11 Ill. 279; *Yates v. Shaw*, 24 Ill. 367; *Bauer v. Gottmanhausen*, 65 Ill. 499; *Kincaid v. Dormey*, 47 Mo. 337; *Majors v. Rice*, 57 Mo. 384; *Willis v. Swartz*, 28 Pa. St. 413; *Riley v. Griffin*, 16 Ga. 141; 60 Am. Dec. 726.

While it is true that the title to real estate cannot be transferred by verbal agreement, yet where the boundary

between contiguous lands is uncertain and disputed, the owners of such lands may agree upon a certain line as the permanent boundary line, and where the agreement is followed by actual occupation according to such line as the boundary, the line will be binding upon them, and their successors in title, as the boundary. The line becomes binding, not upon the principle that the title to real estate can be passed by parol, but for the reason that the proprietors have by such consent and conduct agreed permanently upon the limits or the extent of their respective lands or property: *Crowell v. Maughs*, 2 Gilm. 419; 43 Am. Dec. 62; *Yates v. Shaw*, 24 Ill. 367; *Cutler v. Callison*, 72 Ill. 113; *Kerr v. Hitt*, 75 Ill. 51; *Kincaid v. Dormey*, 47 Mo. 337; *Majors v. Rice*, 57 Mo. 384; *Turner v. Baker*, 64 Mo. 218; 27 Am. Rep. 226; *Jackson v. McConnell*, 19 Wend. 175; 32 Am. Dec. 439; *Acton v. Dooley*, 74 Mo. 63; *Jackson v. Van Corlaer*, 11 Johns. 123; *Rockwell v. Adams*, 7 ²⁶⁸ Cow. 761; *Kip v. Norton*, 12 Wend. 127; 27 Am. Dec. 120; *Vosburgh v. Teator*, 32 N. Y. 561; *Brown v. Caldwell*, 10 Serg. & R. 114; 13 Am. Dec. 660; *Kellum v. Smith*, 65 Pa. St. 86; *Burrell v. Burrell*, 11 Mass. 294; *Hozey v. Clay*, 20 Tex. 582; *Clark v. Hulsey*, 54 Ga. 608; *Riley v. Griffin*, 16 Ga. 141; 60 Am. Dec. 726; *Sawyer v. Fellows*, 6 N. H. 107; 25 Am. Dec. 452; *Orr v. Hadley*, 36 N. H. 575; *Houston v. Matthews*, 1 Yerg. 116; *Jamison v. Petit*, 6 Bush, 669; *Jordan v. Deaton*, 23 Ark. 704; *Boyd v. Graves*, 4 Wheat. 513.

In *Yates v. Shaw*, 24 Ill. 367, it is said: In all matters of uncertainty and dispute the parties may, without doubt, compromise and end the dispute, and they may as certainly fix by agreement the boundary lines separating their lands as other disputes. And when they have thus agreed upon the position of such boundary, and have acted upon it as the true line, they should be estopped from asserting another and different line. Slight acts which may be construed into such an agreement should not, however, be held to conclude the parties. To have that effect they should be clear and satisfactory, and not doubtful and equivocal in their character. When the agreement of the parties to adopt a particular boundary is shown, and possession is taken and held according to such agreement, the parties are estopped to dispute that as the true boundary, and when the fact is satisfactorily established, it is sufficient. And while it may be true that it does not alter or change the original location of such line,

still it must be regarded as the true line, and the parties concluded from disputing it. If it was proved that the McFadden line was by agreement adopted and acted upon as the boundary, and that the parties, in pursuance of that agreement, erected fences or hedges on that line, and took possession in conformity to it, ²⁶⁹ they are now concluded from denying that it was properly and truly located. In *Cutler v. Callison*, 72 Ill. 113, decided in 1874, where the parties agreed in 1868 upon the line where an old fence stood as the true line, and agreed to set out a hedge upon it, and one of the parties furnished the plants, and the other set them out, and there was also evidence of the admission made three years before the trial in the lower court by the recusant party of the agreement, but he claimed there was a further understanding that if the hedge did not turn out to be on the true line, they were to sell and buy, as the case might be, to come to the hedge, it was said that the courts always look with favor upon the adjustment of controverted matters of this character by agreement of the parties in interest, and when an agreement to establish a boundary line is fairly and clearly made, and possession held according to the line so agreed on, no reason is perceived why such an agreement should not be conclusive.

In *Clark v. Hulsey*, 54 Ga. 608, it was held that if parties, or those under whom they claim, agreed upon a certain line between their tracts, and the plaintiff acted upon that agreement and built his fence there, with the knowledge and consent of the defendant, he will not be allowed afterwards to repudiate that agreement and claim a different line, whatever may have been his legal rights independent thereof.

The authorities do not fix upon any particular length of possession under the agreement as essential. In *Hovey v. Clay*, 20 Tex. 582, the period intervening between the agreement and occupation, and the commencement of the action in hostility to the agreed line, was very short, the agreement being in the summer of 1854, and the action having been commenced in September of the same year, while in another case the practical recognition ²⁷⁰ of the line had continued as long as thirty years. It is expressly decided, and, in the nature of things, must be, that occupation for the period required by the statute of limitations to bar a recovery upon the true title is not necessary: *Smith v. Hamilton*, 20 Mich. 433; 4 Am. Rep. 398. Many other cases are conclusive of

the correctness of this view. It is sufficient if the conduct of the parties shows a settled recognition of the line covered by the agreement as the permanent boundary between their lands.

Where the owners are not uncertain as to the true boundary, the statute of frauds applies, and the doctrine announced above is inapplicable: *Nichol v. Lytle*, 4 Yerg. 456; 26 Am. Dec. 240; *Jackson v. Douglas*, 8 Johns. 367; *Vosburg v. Teator*, 32 N. Y. 561; *Terry v. Chandler*, 16 N. Y. 354; 69 Am. Dec. 707. Still it seems, though we do not say it is applicable here, that the acquiescence in an actual location of a line may be of such a nature and of such continuation as to be evidence of an express agreement: *Rockwell v. Adams*, 7 Cow. 761; *Kip v. Norton*, 12 Wend. 127; 27 Am. Dec. 120; *Jordan v. Deaton*, 23 Ark. 704; *Jackson v. McConnell*, 19 Wend. 175; 32 Am. Dec. 439.

Another principle coming within the discussion of this case is, that in cases of mistake as to the true line between adjoining lands, the real test as to whether or not a title will be acquired by a holding for the period of seven years is the intention of the person holding beyond the true line. If such occupation is by mere mistake, and with no intention upon the part of the occupant to claim, as his own, land which does not really belong to him, but he intends to claim only to the true line, wherever it may be, the holding is not adverse. If, however, the occupant takes possession, believing the land to be his own up to the mistaken line, and claiming title to it, and so holds, the holding ²⁷¹ is adverse. The intent to claim title up to the line is an indispensable element of adverse holding; the claim of right must be as broad as the possession. Simple acquiescence, or lying by without objection, for the statutory period, in case of such adverse holding, will bind the party so lying by to the line, though not the true line: *Liddon v. Hodnett*, 22 Fla. 442.

The basis of the first assignment of error is as follows: The defendant, when testifying in his own behalf, was asked if he had been in actual, open, and notorious possession of the disputed piece of land since the White survey was made, and the plaintiff objected, on the ground that it was purely a question of law. That the question was altogether improper, and the action of the judge, which resulted in not permitting it to be answered, right, is clear. The question called for the mere opinion of the defendant on a material issue of fact pre-

sented by the pleadings and evidence, which issue it was the province of the jury to settle, subject to any proper instructions from the court as to the law. The inaccuracy of the objection did not impart any merit to the question or any error to the ruling.

The second assignment is founded upon the court's having excluded a question propounded to defendant in his own behalf, to the effect, whether or not he was claiming the disputed piece of property as his own property at the time Mr. Morrison purchased lot 1. Plaintiff's objection was that the witness was "left to make a specification on his own account." We fail to see the merit of the objection. The particular purpose of the question, in view of the testimony the defendant had given as to his possession, was to bring out more fully the fact that he was not only claiming the property as his own, and not as subject to Morrison, ²⁷² but was doing so at the time Morrison purchased lot 1. As against the objection made the question was not improper. However, it is proper to say that we deem this an immaterial error, in view of the fact that his testimony, given both before and after this ruling, and without objection, shows, as far as any answer to this question could show, that Watrous was claiming the property as his own at the time stated. Had the objection been that the question was leading, it would have been well made. If there was error in the ruling, it is clearly immaterial, as it would be also for the reason, if we could consider a pencil note, in the bill of exceptions, to the effect that the plaintiff withdrew all further objection to questions as to the intention of the defendant.

The defendant was also asked in his own behalf if he had ever admitted to Mr. Morrison, or to any one else, that the land did not belong to defendant, and the objection that the question was leading was sustained. Whether or not the defendant had ever admitted to any one that the land did not belong to him was not a question for his decision, and there was no error in rejecting the question, whether it be leading or not. Whatever in the nature of such an admission that may have passed between the defendant and the plaintiff, or the former and any one else, was admissible to be proved by either party in the proper way, and whatever may have been testified to by the plaintiff, or any other witness, as having so passed, could have been denied by the defendant, or explained by him by a statement of his recollection of what,

if any thing, had passed, but his opinion of whether or not it constituted an admission was properly excluded from the jury; and the fact is that the bill of exceptions shows that this course was pursued by all parties to the fullest ²⁷³ extent; and, consequently, had the question been allowed, we are very much disposed to think that a negative answer would be deemed immaterial to the plaintiff, were he appellant here and assigning it, as error without injury.

The defendant had testified that Morrison purchased lot 1 from Mrs. Taylor, and that he knew her husband, John M. Taylor; and was then asked if he ever had a conversation with the latter in reference to the boundary line between these lots. To this question plaintiff objected, on the ground that Mrs. Taylor could not be bound by any conversation between her husband and any other person, and the judge sustained the objection. This ruling was erroneous. It may have been that the conversation would have tended to show an intention upon the part of Watrous to claim the land up to the White line as his own, exclusive of any other right, and independent of the fact of it being the true line; or, in other words, to establish an adverse possession against Morrison and his predecessors in title: *Liddon v. Hodnett*, 22 Fla. 442. It was not material that the conversation should be binding on Mrs. Taylor, or that there should have been any conversation or agreement with her, to give to Watrous' possession a character adverse to any rights of even Mrs. Taylor.

The next, or fifth, assignment of error is based upon the exclusion of the following question propounded to defendant: "Mr. Watrous, please state whether or not, after the location of the line by Captain White, the owners, or any of the owners, of lot 1 ever made any objection, so far as your knowledge goes, to that line as the boundary line between the two lots"? The objections to this question were, that James E. Lipscomb, ²⁷⁴ who was an owner of the land, was dead when the question was propounded, and that Mrs. Taylor was a married lady. In so far as the objection is founded upon Mrs. Taylor's marriage state, it is disposed of by what is said under the next preceding assignment of error. The absence of any objection upon her part may or may not, according to circumstances, have been evidence tending to show acquiescence as to that line. The defendant was competent to testify simply that he had no knowledge of any such objection by Mr. Lipscomb, who had been an owner, and was covered

by the question, although he was dead at the time it was asked. Whether or not, in the absence of testimony by Morrison, Watrous could have testified as to the substance or effect of any conversation or other communication which might have taken place between him and Lipscomb, is another question, and not presented for decision. Of course, in the absence of evidence that there was such objection by such owners, there was no presumption that any had been made, and the immateriality of the error of the ruling as to this part of the question is consequently apparent; and as Mrs. Taylor is not shown to have ever had any knowledge or information as to the line, the same is true of the other branch of the inquiry.

The sixth assignment, based upon the exclusion of the question whether Mr. Lipscomb, to defendant's knowledge, after the location of the White line, and prior to his sale to Mr. Morrison, made any objection to that line as the dividing line between the lots, is disposed of by what is said under the fifth assignment as to the second ground of the objection to the question discussed there.

275 The seventh assignment relates to an instruction given by the trial judge to the jury. The judge charged: "In actions of this character the plaintiff must rely for recovery upon the strength of his own title, and cannot avail himself of any weakness in the title of the defendant. But when plaintiff shows legal title to the premises in himself, then the law presumes that he was possessed of the same within the time prescribed, and the occupation of the premises by any other person will be deemed and held to be under and in subordination to the legal title until the contrary is shown by competent testimony. And persons claiming adversely must show an actual continued possession or occupation of the premises, under a claim of title exclusive of all other rights, for a period of seven years, in order to defeat this action." The last sentence was excepted to in the motion for a new trial, and the exception was overruled.

It may be well to say in this connection that by section 1290 of the Revised Statutes it is provided that whenever it shall appear that the occupant . . . entered into possession of the premises "under claim of title exclusive of any other right," founding such claim upon a written instrument as being a conveyance of the premises in question, . . . and that there has been a continued occupation and possession of the premises included in such instrument, . . . the prem-

ises so included shall be deemed to have been held adversely, with an exception. And the next section provides that where it shall appear that there has been an actual continued occupation for seven years of premises "under a claim of title exclusive of any other right," but not founded on a written instrument, or a judgment, or a decree, the premises so actually occupied, and no other, shall be deemed to have been held ²⁷⁶ adversely. It seems to us that the expression, "under claim of title exclusive of all other rights," used in the charge, is no broader and only tantamount to that "under claim of title exclusive of any other right," used in the statute, and is distinguishable from the expression used in the latter part of the last charge discussed in the case of *Liddon v. Hodnett*, 22 Fla. 442.

It is said, in support of the objection, that the instruction "would be correct if the only defense set up under the adverse claim was the statute of limitations, but where, as in this case, the defendant claims, by reason of his adverse holding, that the plaintiff's deed conveyed no title as against him, the instruction is misleading, and clearly erroneous." A proper and sufficient answer to this is, as is apparent, that the judge was not charging upon the question of the effect of an adverse possession of land by one person upon a conveyance thereof made by another not in possession.

The eighth assignment is that the court erred in instructing the jury as follows: "The plaintiff having first established his title by sufficient record evidence." The motion for a new trial, in which, we may remark, all exceptions to charges given or refused were primarily taken, is, in so far as it relates to this ground, in the same language. The instruction of which the quoted words are a part is as follows: The defendant by his plea sets up and relies upon the statute of adverse claim, and it is incumbent upon him to prove his occupation and adverse claim by a preponderance of evidence, the plaintiff having first established his title by sufficient record evidence, and the defendant must prove, to your satisfaction, every fact necessary to fulfill all the requirements of the statute. The objection urged here is that the charge ²⁷⁷ is not confined to the law of the case, and is consequently a violation of the act of March 2, 1877: Rev. Stats., sec. 1088. The purpose of the judge, in our judgment, was not to declare that the plaintiff had, as a matter of fact, established his title by sufficient record evidence, and thereby to express an opinion

as to the sufficiency of the evidence on this point, but his purpose and meaning were that the *onus* of proving adverse possession as a defense would not arise until the plaintiff had first established his title in the manner stated: *Spencer v. Commonwealth*, 2 Leigh, 751, 754-756. Of course one cannot, by excepting to a part of any instruction, exclude a consideration of the remainder of the charge. It may be that one part of a charge will correct the error apparent in another part of it considered alone; and the same may be true as to distinct instructions. Still, as the case will go back for a new trial, we think it well to suggest that the expression might under some circumstances mislead, and is not to be commended.

The instruction given to the jury, and referred to in the ninth assignment of error, is as follows: If you find from the evidence that the plaintiff and defendant became the owners in fee of adjoining lots or tracts of land, and that when they came into possession there had not been established a true line or boundary between them, and that there had not been such an adverse holding or claiming of title by defendant as was necessary to perfect his right under the statute of adverse claim up to that time, and that they then agreed to have the true boundary line established by a survey, and to abide by such survey, then you will be justified in finding that his claim or holding was only intended to be to the true line, wherever it might be, when legally established by proper methods. The charge was not ²⁷⁸ erroneous. Although the defendant had been holding and claiming up to the White line prior to plaintiff's purchase, it was competent for him, upon the plaintiff's becoming owner of lot 1, the statute not having run in favor of defendant, to agree, even by parol, upon ascertainment of the true line as their boundary, and such agreement would justify the inference.

The tenth assignment of error is based upon the court's having instructed the jury: "But the adverse claim must have been open, notorious, and unconditional, asserted at all times, and in all places wherever necessary to make it generally known and understood." The entire instruction, of which the above is a part, is the next following, that given under the ninth assignment of error, and is as follows: "If, on the other hand, you find that the defendant entered into the possession and occupation of the lands in controversy, using and cultivating, or having the same inclosed by a sub-

stantial fence, but the adverse claim must have been open, notorious, and unconditional, asserted at all times, and in all places, wherever necessary to make it generally known and understood, and claiming the same as his own against all other rights or claims of title by all other persons, and that he had so held and claimed the same for a period of seven years before the commencement of this suit, then you should find for the defendant." The incompleteness of the clause preceding the word "but," is palpable. The word "notorious" is one used in defining an adverse holding: *Brown v. Cockerell*, 33 Ala. 38; 2 Smith's Leading Cases, Am. note to *Taylor v. Horde*, 1 Burr. 60. In *Brown v. Cockerell*, 33 Ala. 38, it is said that notoriety and openness of possession are important constituents of adverse possession as facts upon which the presumption of the owner's knowledge may be predicated.²⁷⁹ the whole doctrine of adverse possession resting on the presumed acquiescence of the owner: *Benje v. Creagh*, 21 Ala. 151, 156. The expression in 1 Am. & Eng. Ency. of Law, 262, where numerous authorities are cited, is, that in any case the possession, to effect an ouster of the owner, must in its nature possess such notoriety that the owner may be presumed to have notice of it and of its extent: 1 Am. & Eng. Ency. of Law, 264; *Kerr v. Hitt*, 75 Ill. 51-60. It seems to us not unadvisable to accompany this expression, when used, with some such explanation, and thereby prevent any misapprehension by the jury as to the extent of the notoriety that is requisite. To declare that the adverse holding must be asserted at all times and in all places wherever necessary to make such claim generally known and understood, is, to say nothing more, calculated to mislead a jury, at least by leaving it to them to decide at what times and places it is necessary to make such claim generally known and understood. They might infer that an indiscriminate assertion and a publicity of explanation of an adverse holding, not contemplated by the law, was necessary.

The eleventh assignment presents, as erroneous, the following instruction: "An agreement to settle the boundary between coterminous owners, in order to bind them, must be assented to by all of such owners, and must be made after the line is fixed. An agreement to have a survey made and to abide by it is not such an agreement as the law contemplates." Of course, a nonconsenting owner will not be bound by the agreement of the others, nor will any stranger to that

agreement who may claim under him; however, should the consenting owner afterwards become the sole owner of the entire land, or of a distinct part of it, and continue to recognize the boundary line previously ²⁸⁰ agreed on, and acted upon by him and the owner of the adjoining land, we do not see why such line would not be binding to the extent of his several ownership. We think it would be.

The suggestion that an agreement to settle a boundary must be made after a line has been fixed is incorrect. Parties may agree orally to have an uncertain or disputed line run, and that it shall be the controlling line, and if they afterwards treat it as the permanent dividing line, by improving up to it, or otherwise, they will be confined to that line.

The proposition that an agreement to have a survey made, and abide by it, is not such an agreement as the law contemplates, is entirely unsound. Such an agreement is a common, if not an essential, element in the settlement of disputed boundaries by coterminous owners, except where such settlements rest either upon the ascertainment of the true line or upon adverse possession which has ripened into title under the statute of limitations.

The instruction to which the twelfth assignment refers is as follows: "In adverse claims of premises lying upon an unsettled boundary, the claim must be open, notorious, and continued; *and to make it so in this case the defendant should at all times have asserted it in his conversations with the plaintiff*; he could not, by offers to buy, or to settle the question of boundary by other methods, lull the plaintiff into passive acquiescence, and then, when the statute had run, avail himself of it as a defense." The italicized language is the part objected to by appellant, and it appears to us, in view of the remainder of this instruction, that the meaning intended to be conveyed by the judge, and naturally inferable by a jury, is that the ²⁸¹ defendant's conversations should have maintained consistently an adverse tenure; yet the defect which this construction develops is an intimation, by the charge, that the defendant was not thus consistent, but the contrary. We think the charge was erroneous on the latter ground, and should not have been given.

The trial judge charged the jury: "A mere agreement, though a mutual one, to employ a common agent or surveyor to run a line and set up boundaries between two adjoining proprietors, where the dividing line is susceptible of being cor-

rectly located, would not estop either party from showing an error or mistake in such line. So, although the jury in this case should believe that James E. Lipscomb and the defendant Watrous employed one White, as a surveyor, to run a line and set up the bounds between the lots of land owned by them respectively as adjoining proprietors, such an agreement would not estop the said Lipscomb, nor his grantee or grantees, from showing an error in the line which might be run and established by him, the said White." The latter of these instructions was excepted to in the motion for a new trial. It and the former one are, it will be observed, very guardedly expressed, and very limited in their scope. A mere agreement, going no further than these instructions imply, would, as is stated in them, not work, of itself, an estoppel against showing an error in a line run under it. There was no error in giving them.

The fourteenth assignment is as to the charge: "That while it is a general rule of law that a conveyance of land by a person against whom it was adversely held at the time of making such a conveyance is absolutely void, and conveys no title as against the person so holding adversely, yet this rule does not apply where the possession was taken purely by mistake as to the ²⁸² boundaries of the deed." The instruction is inaccurate. A possession by one coterminous owner may have been taken purely by mistake, but may have been held afterwards adversely to any right of the adjoining proprietor or any other person, intentionally, avowedly, openly, and continuously. Where at the time of a conveyance the holding or possession was by mistake, and without intention to claim independently of the correctness or error of the line held up to, the conveyance will not be void, and for the reason that the holding is not adverse. Where the holding is with the intention to claim the land adversely, independent of the correctness or error of the boundary line, and the claim of title and the possession are of a character to render the possession adverse to the true title, within the meaning of the statute of limitations (Rev. Stats., secs. 1290, 1291), a conveyance by the disseisee would be void as against the disseisor as to such of the land as was so occupied at the time of the conveyance: *Boston etc. R. R. Co. v. Sparhawk*, 5 Met. 469; *Sparhawk v. Bagg*, 16 Gray, 583; *Foxcroft v. Barnes*, 29 Me. 128; *Abbott v. Abbott*, 51 Me. 575. The cases of *Cleveland v. Flag*, 4 Cush. 76, and *Wade v. Lindsey*, 6 Met. 407, are easily distinguish-

able from the preceding authorities. It is proper to observe that we have no statutory provision like that of the revised statutes of New York as to champerty, upon which is founded the decisions of *Crary v. Goodman*, 22 N. Y. 170, and *Higinbotham v. Stoddard*, 72 N. Y. 94. Our doctrine (*Doe v. Roe*, 13 Fla. 602; *Nelson v. Brush*, 22 Fla. 374) is to be regarded as based originally upon the common law and statute of 32 Hen. VIII., c. 9; *Pechell v. Watson*, 8 Mees. & W. 691; Tyler on Ejectment, 935 et seq.; Thompson's British Statutes, 475 et seq.; and now affected ²⁸³ by the provisions of our statute of limitations as to adverse possession, *supra*.

The fifteenth, sixteenth, and seventeenth assignments relate to instructions alleged to have been requested on behalf of the defendant and rejected by the circuit judge; but the only indication there is of their having been requested are the statements in the motion for a new trial, as embodied in the bill of exceptions, to the effect that the court erred in refusing to give such instructions. This is not legal evidence that they were duly presented to the judge on the trial, and hence they cannot be considered here: *Parrish v. Pensacola etc. R. R. Co.*, 28 Fla. 251.

The judgment is reversed, and a new trial awarded.

BOUNDARIES—SURVEYS OR MONUMENTS—WHICH CONTROL: See the extended note to *Heaton v. Hodges*, 30 Am. Dec. 740; note to *Stafford v. King*, 94 Am. Dec. 313. A call for a river as a boundary will control a surveyor's plat showing a line which would leave a narrow strip between the river and the adjacent side of the land conveyed: *Brown Oil Co. v. Caldwell*, 35 W. Va. 95; 29 Am. St. Rep. 793.

BOUNDARIES BY AGREEMENT—WHEN BINDING.—Boundary lines established by the agreement of adjoining proprietors, when followed by possession held in pursuance of such an agreement, are conclusive: *Brown v. Caldwell*, 10 Serg. & R. 114; 13 Am. Dec. 660, and note; *George v. Thomas*, 16 Tex. 74; 67 Am. Dec. 612. The same rule is true where such agreements are by parol: *Nichol v. Lytle*, 4 Yerg. 456; 26 Am. Dec. 240, and note; *Sawyer v. Fellows*, 6 N. H. 107; 25 Am. Dec. 452, and note; *Smith v. Hamilton*, 20 Mich. 433; 4 Am. Rep. 398; *Archer v. Helm*, 69 Miss. 730; *Gwynn v. Schwartz*, 32 W. Va. 487; *Sheets v. Sweeney*, 136 Ill. 336; *Smith v. McCorkle*, 105 Mo. 135; *Cavanaugh v. Jackson*, 91 Cal. 580. See, also, the extended note to *Johnson v. Archibald*, 22 Am. St. Rep. 35, and the notes to *Kip v. Norton*, 27 Am. Dec. 121, and *Jones v. Pashly*, 11 Am. St. Rep. 592.

ADVERSE POSSESSION BEYOND TRUE LINE—INTENT CONTROLS.—Where lands are divided by a fence, which their owners supposed to be the true line, each claiming only to the true line, wherever that may be, they are not bound by the supposed line, and must conform to the true line when it is ascertained: *Battner v. Baker*, 108 Mo. 311; 32 Am. St. Rep. 606, and note. Where adjacent owners of land claim only to the true line between them,

without intending to claim beyond it, the possession of one beyond the true vine is not adverse to the other: *Kunze v. Evans*, 107 Mo. 487; 28 Am. St. Rep. 435, and note; *Preble v. Maine Cent. R. R. Co.*, 85 Me. 260; 35 Am. St. Rep. 366, and note. See, also, on this subject the extended note to *Finch v. Ullman*, 24 Am. St. Rep. 388.

ADVERSE POSSESSION BY MISTAKE—WHEN ACQUIRED.—Where one by mistake as to boundaries enters upon and occupies land not embraced in his title, claiming it as his own for the requisite period, he thereby becomes vested with the title thereto by possession, although his entry and possession may have been founded on mistake: *Caulfield v. Clark*, 17 Or. 473; 11 Am. St. Rep. 845, and note; *Tex v. Pflug*, 24 Neb. 666; 8 Am. St. Rep. 231; *Levy v. Yerga*, 25 Neb. 764; 13 Am. St. Rep. 525, and note; *Ramsey v. Glenny*, 45 Minn. 401; 22 Am. St. Rep. 736, and note.

BOUNDARIES BY AGREEMENT—ESTOPPEL.—Owners of adjoining lands, who are ignorant of the true line between them, and employ a surveyor to locate it for them, are not bound by his location thereof if incorrect, even though they acquiesce in it believing it to be correct: *Pickett v. Nelson*, 79 Wis. 9; *Thayer v. Bacon*, 3 Allen, 163; 80 Am. Dec. 59, and note; *Russell v. Maloney*, 39 Vt. 579; 94 Am. Dec. 358, and note. A division line between two persons, agreed upon by them under a mistake of facts, will not estop one of them from claiming to the true line upon its discovery, provided the rights of innocent third parties have not intervened: *Knowlton v. Smith*, 36 Mo. 507; 88 Am. Dec. 152, and note; *Brewer v. Boston etc. R. R. Co.*, 5 Met. 478; 39 Am. Dec. 694, and note; *Crowell v. Bebee*, 10 Vt. 33; 33 Am. Dec. 172, and note.

CASES

IN THE

SUPREME COURT

OF

ILLINOIS.

DOW v. BLAKE.

[148 ILLINOIS, 76.]

PRACTICE.—A VARIANCE BETWEEN A JUDGMENT AS DESCRIBED in the declaration and the judgment as proved is waived if not objected to when it is offered in evidence.

JUDGMENT—MERGER OF ONE IN ANOTHER.—If a judgment is rendered, divorcing parties, and designating a sum to be paid by the husband to the wife on releasing her claim to dower, and subsequently another judgment is rendered in the same suit, by which the wife recovers a much greater sum, the former judgment merges in the latter so far as it directs the payment of money.

A JUDGMENT RENDERED IN ANOTHER STATE, IF SUED UPON HERE, must be given the same force and effect as it is entitled to in the state wherein it is entered.

AN APPEAL FROM A JUDGMENT RENDERED IN ANOTHER STATE Does not suspend the effect of the judgment in an action thereon in this state, unless such appeal has that effect in the state in which the judgment was entered.

A JUDGMENT IS PROPERLY DECLARED UPON AS A JUDGMENT OF THE COURT IN WHICH IT WAS ENTERED, though it was afterwards appealed from and affirmed in the appellate court.

A JUDGMENT MUST BE FINAL BEFORE AN ACTION UPON IT can be sustained.

A JUDGMENT IS NOT FINAL UNLESS it is complete and definitive in its nature, and a valid and subsisting obligation. It must be certain, or capable of being made so.

A JUDGMENT IS FINAL THOUGH THE DEFENDANT IS GIVEN LEAVE TO APPLY TO THE TRIAL COURT for a modification of it as to the time of its payment.

A JUDGMENT IS FINAL IF NO FURTHER QUESTIONS CAN COME BEFORE THE COURT EXCEPT such as are necessary to be determined in carrying it into effect.

A JUDGMENT MAY BE ENFORCED BY AN ACTION, THOUGH a petition has been filed in the trial court to reduce the amount thereof.

A JUDGMENT IS FINAL WHEN IT ALLOWS A GROSS SUM TO A WIFE in a divorce suit, as a final distribution of the husband's estate between the parties.

AN ACTION LIES ON A FINAL DECREE FOR ALIMONY, though rendered in another state.

IN AN ACTION ON A DECREE OF A COURT OF ANOTHER STATE THE DEFENSE that it was a decree of divorce obtained by collusion between the parties cannot be entertained. Neither the defendant nor his personal representative can attack the decree because of fraud in which the defendant participated.

A JUDGMENT CANNOT BE IMPEACHED for fraud by a party or privy to it, and in which such party participated.

AN ATTACHMENT IS NOT ABATED BY THE DEATH OF THE DEFENDANT.

Doolittle, Palmer, and Tolman, for the plaintiff in error.

Millard and Boyesen, and J. A. Eggen, for the defendant in error.

SO MAGRUDER, J. This is an action of debt, begun on October 12, 1889, by the defendant in error against Barnum Blake in the circuit court of Cook county. An attachment writ was issued upon the ground of the defendant's nonresidence, and levied upon real estate in Cook county. The declaration counts upon a judgment for \$31,000 rendered in favor of the plaintiff, Christine Blake, against Barnum Blake, by the circuit court of Milwaukee county, in the state of Wisconsin, at the October term thereof held in 1888. On November 23, 1889, Barnum Blake, by his attorney, entered a motion in the present case for stay of proceedings, which was overruled. On December 9, 1889, the death of Barnum Blake was suggested. On September 11, 1890, leave was given the plaintiff to substitute William C. Dow, administrator of the estate of Barnum Blake, deceased, as party defendant. On October 17, 1890, said administrator appeared and filed two pleas, *nul tiel record* and payment, but did not plead to the attachment writ. On March 23, 1892, defendant moved for leave to file additional pleas, which motion was overruled, and default entered of record on the attachment issue. On March 26, 1892, the cause came on for trial. By agreement, both parties were allowed to introduce such portions of the statutes of Wisconsin, and such decisions of the supreme court of that state as they might deem proper, without formal pleadings thereof. Jury was waived, and cause submitted to the court for trial without a jury. The circuit court found in favor of the plaintiff, and, after overruling a motion for a new trial, rendered judgment in favor of plaintiff for \$31,000 debt,

and ^{§1} \$7,209 damages, against the administrator, to be paid in due course of administration, and for execution against the property attached. This judgment has been affirmed by the appellate court, and is brought here for review by writ of error.

1. It is claimed by plaintiff in error that there was a variance between the judgment declared upon and the judgment offered in evidence, and that, therefore, the judgment record was improperly admitted. It is said that the declaration sets up an absolute judgment for \$31,000, rendered on December 24, 1888, but that the judgment introduced was a conditional judgment for \$2,000, rendered on May 6, 1882, and subsequently modified. In order to understand this objection, it will be necessary to examine the record of the judgment as introduced. The proceedings in Wisconsin, offered in evidence by the plaintiff, showed that, in a divorce suit in said circuit court of Milwaukee county brought by Christine Blake against Barnum Blake, there was entered, on May 6, 1882, the following judgment or decree:

"It is adjudged and decreed that the marriage contract existing between plaintiff and defendant herein be, and is hereby, dissolved; and it is further adjudged and decreed that the plaintiff, Christine Blake, and said defendant, Barnum Blake, be and are hereby forever divorced from the bonds of matrimony, and freed from the obligations thereof; and it is further ordered, adjudged, and decreed that the defendant, Barnum Blake, have the care, custody, and education of the minor children, John F. Blake and Arthur O. Blake, mentioned in the complaint herein; and it is further ordered and adjudged that the defendant, Barnum Blake, pay to Christine Blake, the plaintiff herein, the sum of \$2,000, upon the execution by her of a release in full of all her dower right that she ever had, now has, or at any time may have, in any of the real estate owned by the defendant, Barnum Blake, during the coverture; that the plaintiff have the costs in this action, and that she have execution therefor."

^{§2} Afterwards, upon petition filed in said court by said Christine in 1886, the court, after finding, in substance, that the former provision was inadequate, and had been made under a mistaken estimate of the pecuniary ability of Barnum Blake, rendered the following judgment therein on December 24, 1888:

"It is now here ordered and adjudged by this court, that Christine Blake, the plaintiff, do have and recover of Barnum

Blake, the defendant, the sum of \$30,000, and the further sum of \$1,000 for attorney's fees and disbursements in this proceeding, amounting in all to the sum of \$31,000, as the full and final share and allowance of the plaintiff in the final division and distribution of the estate and property, real and personal, of the said defendant, Barnum Blake; and it is further ordered and adjudged, that, except as it is herein modified or superseded, said original judgment stand and remain in full force and effect."

The objection on the ground of variance, in description and date, between the judgment as proven and the judgment as declared upon, was not made when the judgment-roll was offered, although a number of other objections were made at that time. Not having been made then, it will be regarded as having been waived. The judgment of December, 1888, is something more than a mere modification of, or supplement to, the decree of 1882. That judgment is complete in itself, and answers to the allegation in the declaration. When it was rendered, nothing remained of the decree of 1882, except the provisions annulling the marriage and giving the defendant the custody of the children; all the rest of that decree was merged in the judgment of 1888, which was for a definite and specific sum.

2. It is claimed that, as the divorce case was carried for review to the supreme court of Wisconsin, the judgment of the latter court was the final one, and that the record of said court was the proper one to be presented in an action on ⁸³ the judgment. The defendant below introduced in evidence the proceedings in the Wisconsin supreme court, showing that the decree of the lower court for \$31,000 was affirmed on September 24, 1889, and, on petition for rehearing, the order of affirmance was adhered to, but leave was given to apply for a modification of the judgment as to the time of payment; the following being the judgment of the supreme court of that state:

"This cause came on to be heard on appeal from the judgment of the circuit court of Milwaukee county, and was argued by counsel. On consideration thereof, it is now here ordered and adjudged by this court that the judgment of the circuit court of Milwaukee county in this cause be, and the same is hereby, affirmed, with costs against the said appellant, taxed at the sum of \$45.50, and with leave to the said appellant to apply to the trial court for a modification of the judgment as

to the time or times for the payment of the same": *Blake v. Blake*, 75 Wis. 339. Counsel for plaintiff in error take the position that, when the continuation of the record was produced showing that the judgment sued upon had been appealed, it affirmatively appeared that there was no such record as that counted upon, and that, therefore, the plea of *nul tiel record* was supported.

The constitution of the United States (article 4, section 1) provides that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every state, and that Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof. Congress has enacted, after providing for the mode of authenticating the acts, records, and judicial proceedings of the states, etc., that the records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken: Act of 84 May 26, 1790; U. S. Rev. Stats., sec. 905. Hence, where suit is brought in this state upon a judgment rendered in another state, such judgment will here be given the same force and effect as it has in the state where rendered. If it be shown that, by the law of the state where the judgment was rendered, an appeal has the effect of suspending the judgment appealed from, or of staying the execution thereof, the pendency of such appeal is a material fact to be proven in a suit upon the judgment in this state. But unless it appear that the appeal or writ of error suspends the judgment in the state where it was rendered, its pendency is no bar to an action in another state on the judgment: *Taylor v. Shew*, 39 Cal. 536; 2 Am. Rep. 478; *Suydam v. Hoyt*, 25 N. J. L. 230; *Merchants' Ins. Co. v. De Wolf*, 33 Pa. St. 45; 75 Am. Dec. 577; *Woodward v. Carson*, 86 Pa. St. 176; *Faber v. Hovey*, 117 Mass. 107; 19 Am. Rep. 398. It is not, therefore, necessary to declare upon the foreign judgment as disposed of by the appellate court, but only as rendered by the inferior court; especially where, as is the case here, the judgment of the inferior court does not show upon its face that an appeal from it has been taken. The pendency of an appeal which operates as a stay is a matter to be proven as a defense to, or in suspension of, the action. In the present suit, however, the proof introduced by the defendant shows that the appeal was not pending, but had

been disposed of by an affirmance of the judgment by the supreme court of Wisconsin. A careful examination of the facts in *McLaren v. Kehler*, 23 La. Ann. 80, 8 Am. Rep. 591, to which counsel refer, will not disclose any thing inconsistent with the views here expressed.

3. It is further objected that the judgment declared upon is not a final judgment. A foreign judgment, or judgment of a sister state, cannot be sued upon, unless it is final and conclusive in the country or state where it was rendered, according to the law of that place. It should be "complete and definitive in its nature, and a valid and subsisting obligation." It must be "certain, or capable of being made so": ⁸⁵ 2 Black on Judgments, secs. 845, 959; 12 Am. & Eng. Ency. of Law, 148 m, 149 j.

It is said that the judgment is not final, because the order of the supreme court affirming it gave the defendant leave to apply to the trial court for a modification of it as to the time of its payment. The material circumstance in favor of the finality of the judgment is that no leave was given to modify the judgment itself. It is manifest, that an application, which has reference to the time of payment of a judgment or decree, is directed only to the matter of carrying it into effect. The general rule is, that, if after a judgment or decree has been entered, no further questions can come before the court, except such as are necessary to be determined in carrying it into effect, it is final: 1 Freeman on Judgments, sec. 22.

Our attention is called to the fact that on March 7, 1892, the administrator of Barnum Blake filed a petition in the Milwaukee county circuit court, and that such petition is still pending. An examination of the petition shows that it is not an application to modify the judgment as to the time of payment, but to reduce the amount of the judgment itself. We do not think that the pendency of such a petition, under the circumstances of this case, can interfere with the prosecution of the present action.

It is claimed that the judgment is not final, upon the alleged ground that the payment of the \$31,000 is subject to the condition that the plaintiff shall release her dower in the defendant's lands. As such a condition was expressed in the judgment of 1882, and as the original judgment was to stand, except as modified or superseded by the judgment of 1888, it is therefore argued that the condition as to the release of dower is a part of the latter judgment. Without discussion

of the question, whether the judgment for \$31,000 is or is not a complete substitute, both for the judgment for \$2,000 and for the condition attached to the payment of the latter sum, it is sufficient to say, that the record of the proceedings ⁸⁶ in the Wisconsin court, as introduced by the plaintiff, shows, with sufficient certainty, that the \$2,000 has been paid, and that the dower has been released. Not only is it so averred in the petition filed in the divorce case for an increase of the allowance, but the affidavit or answer therein filed by the defendant admits that he paid the \$2,000, and as he was not obliged to make such payment unless the dower was released, the reasonable conclusion is, that it was released, especially as the answer does not deny the release.

It is furthermore contended that the judgment is not final, upon the alleged ground that it is merely a judgment for temporary alimony, and therefore variable and subject to change, and that, under the statutes of Wisconsin, there can be no final decree for permanent alimony without a division and partition of the husband's estate. As we construe the case of *Blake v. Blake*, 75 Wis. 339, this very judgment was there held to be final. But if such is not the correct construction of that case, the judgment expressly declares that the recovery of the \$31,000 shall be "the full and final share and allowance of the plaintiff in the final division and distribution of the estate and property, real and personal, of the said defendant." The supreme court of Wisconsin has held, as we understand the decisions, that the allowance of a gross sum to the wife in a divorce suit may operate as a final division and distribution of the husband's estate between the parties where it is so expressly declared in the judgment: *Hopkins v. Hopkins*, 40 Wis. 466; *Bacon v. Bacon*, 43 Wis. 197; *Blake v. Blake*, 68 Wis. 303; 75 Wis. 339; *Campbell v. Campbell*, 37 Wis. 224; *Thomas v. Thomas*, 41 Wis. 229; *Pauly v. Pauly*, 69 Wis. 419. The fact that leave was given to apply for a modification as to the time of payment, negatives the idea that the judgment was subject to modification in any other respect. We think that the judgment of 1888 is final, and certain, and complete.

⁸⁷ 4. It is urged that an action will not lie in one state upon a judgment for alimony rendered in another state. There are some authorities which seem to support this contention. Such are *Van Buskirk v. Mulock*, 18 N. J. L. 184; *Barber v. Barber*, 2 Pinn. 297; *Elliott v. Ray*, 2 Blackf. 31.

These cases proceed upon the ground either that at common law an action of debt will not lie upon a decree in equity, or that the decree for alimony sued upon was not final in its character, and was subject to modification, or that the decree did not have the force and effect of a judgment in the state where it was rendered. But we see no reason why a final decree, which directs the payment of a specific sum of money, should not have the same force and effect as a judgment at law; and it has not been here shown that it does not have such force and effect in the state of Wisconsin. Where such a final decree is rendered by a court of competent jurisdiction in one state, the constitution of the United States requires that full faith and credit be given to it in every other state. It makes no difference, so far as the duty of the courts in another state to enforce it is concerned, that the specific sum required to be paid by such a final decree is for alimony. In some of the earlier cases the courts had difficulty in sustaining an action by a woman against her husband upon such a decree, because the law governing their decisions then was that a *feme covert* could not sue as a *feme sole*, even though she was living apart from her husband with his consent: *Barber v. Barber*, 2 Pinn. 297.

We think that an action can be maintained in one state upon a final decree for alimony rendered in another state. This position is sustained by the following authorities: *Barber v. Barber*, 21 How. 582; *Allen v. Allen*, 100 Mass. 373; *Stewart v. Stewart*, 27 W. Va. 167; *Rigney v. Rigney*, 23 Abb. N. C. 212. See, also, *Howard v. Howard*, 15 Mass. 196. Bishop, in his recent work on Marriage, Divorce, and Separation, volume 2, section 847, says: "A decree ^{ss} for alimony, there being a competent jurisdiction, is a record to which, under the constitution of the United States, must be given full faith and credit in every other state. The courts of the other state, wherein the decree is relied upon, will accord to it the effect it has under the law of the state of its rendition, not under that of their own state."

5. It is further assigned as error that the trial court denied defendant's application to file additional pleas. The application was made only three days before the cause was reached for trial, and more than seventeen months after the issues had been made up. It was discretionary with the court to allow the pleas to be filed at a date so late in the progress of the cause, and we cannot say that, under the circumstances, there

was any abuse of discretion in denying the application: *Brown v. Booth*, 66 Ill. 419; *Milliken v. Jones*, 77 Ill. 372; *Fisher v. Greene*, 95 Ill. 94; *Chicago etc. R. R. Co. v. O'Connor*, 119 Ill. 586.

One of the alleged facts, which it was proposed to plead, was that the recovery was based upon a fraudulent and collusive divorce, "obtained by collusion and agreement between the plaintiff and deceased." The general rule is, that the judgment of a state court may not be impeached collaterally in a court of another state on the ground of fraud, unless fraud in procuring it could be set up as a defense in the state where it was rendered: *Ambler v. Whipple*, 139 Ill. 311; 32 Am. St. Rep. 202. It is very clear that if Barnum Blake had been alive, he could not set up as a defense to the present action that the decree of divorce from his wife had been obtained by collusion with her, nor could he have urged such alleged collusion in the courts of Wisconsin as a reason for setting aside the decree there. This is true upon the well-settled principle, that, in a court of justice, a man cannot complain of a wrong done by himself, or of another's wrong in which he was a partaker. He cannot attack a decree of divorce upon the ground that it was obtained through a fraud committed by himself: *Prudham* ⁵⁹ v. *Phillips*, 2 Amb. 763; *Allen v. MacLellan*, 12 Pa. St. 328; 51 Am. Dec. 608; *Greene v. Greene*, 2 Gray, 361; 61 Am. Dec. 454; *Simons v. Simons*, 47 Mich. 253; *Adams v. Adams*, 51 N. H. 388; 12 Am. Rep. 134; *Ruger v. Heckel*, 85 N. Y. 483; *Coddington v. Coddington*, 10 Abb. Pr. 450; *Miltimore v. Miltimore*, 40 Pa. St. 151; 2 Bishop on Marriage, Divorce, and Separation, secs. 1548, 1563; 5 Am. & Eng. Ency. of Law, 844, 845. We do not see why such a defense is not as much forbidden to the administrator of Blake as it would have been to Blake himself. The administrator is a mere representative of the deceased, a privy in representation: *McIntyre v. Sholty*, 139 Ill. 171. As a general rule, no judgment can be impeached for fraud by a party or privy to it: 2 Freeman on Judgments, secs. 334, 336; *Atkinsons v. Allen*, 12 Vt. 619; 36 Am. Dec. 361; *Baugh v. Baugh*, 37 Mich. 59; 26 Am. Rep. 495. "The parties to an action, and the persons in privity with them, cannot collaterally attack or impeach a judgment for fraud": 2 Freeman on Judgments, sec. 336. If the defendant in a divorce decree cannot attack it because it was obtained by his own fraud, it would seem to be true that his administrator could not attack

it because of such fraud. If he cannot take advantage of his own wrong in his lifetime for the purpose of saving his estate from liability, his representative, after his death, ought not to be allowed to save his estate from liability by taking advantage of that same wrong.

The only other matters proposed to be pleaded were, that the judgment sued upon was rendered in a divorce proceeding, and was not final, nor enforceable without the limits of Wisconsin, and was uncertain, and that a proceeding was pending for its modification. All these matters appeared upon the face of the record evidence which was introduced, and the questions arising out of them were taken advantage of by the defendant, and heard and considered by the court: *Milliken v. Jones*, 77 Ill. 372.

6. It is contended, finally, that the writ of attachment in this case abated upon the death of Barnum Blake. It was⁹⁰ held in *Davis v. Shapleigh*, 19 Ill. 386, that an attachment proceeding does not abate by the death of the defendant. An examination of that case will show that the language of the eighth section of the abatement law and of the seventh section of the attachment law, as those laws then existed, authorized the conclusion there reached, independently of the thirty-fifth section of the then existing attachment law. Said eighth section of the abatement act of 1845 is substantially the same as the eleventh section of the present abatement act, and said seventh section of the attachment act of 1845 is substantially the same as the third section of the present attachment act: Gross' Stats. of 1871, c. 1, sec. 8, p. 2; c. 9, sec. 9, p. 32; 1 Starr and Curtis Annotated Statutes, c. 1, sec. 11, p. 183; c. 14, sec. 3, p. 311; *Rauh v. Ritchie*, 1 Ill. App. 188. We think that the decision in the Shapleigh case is applicable to the language of the statutes as they now exist, and that the sixth objection of plaintiff in error is not well taken.

The judgment of the appellate court is affirmed.

Judgment affirmed.

JUDGMENTS OF SISTER STATES—ACTIONS ON.—A judgment of a sister state obtained in an action wherein the defendant has been served with process, or appeared, is conclusive, and an action may be maintained thereon: *Spencer v. Brockway*, 1 Ohio, 259; 13 Am. Dec. 615; *Fletcher v. Ferrel*, 9 Dana, 372; 35 Am. Dec. 143, and note; *Ritchie v. Carpenter*, 2 Wash. 512; 26 Am. St. Rep. 877. Judgments *in personam* of sister states are placed on the same footing as domestic judgments, and entitled to the same credit

and effect, when sought to be enforced in the different states, as they, by law or usage, have in the particular states wherein they were rendered: *Ambler v. Whipple*, 139 Ill. 311; 32 Am. St. Rep. 202, and note.

JUDGMENTS—WHEN FINAL.—See the extended notes to *Williams v. Field*, 60 Am. Dec. 427–439, and *Davie v. Davie*, 20 Am. St. Rep. 173, 174. A final decree is one which disposes of the whole merits of the cause before the court, reserving no further questions or directions for further determination: *Traff v. Hewitt*, 1 Ohio St. 511; 59 Am. Dec. 634, and note; *Bank of Mobile v. Hall*, 6 Ala. 141; 41 Am. Dec. 41. This question is further discussed in the following cases: *State Nat. Bank v. Neel*, 53 Ark. 110; 22 Am. St. Rep. 185; *Arnold v. Sinclair*, 11 Mont. 556; 28 Am. St. Rep. 489, and note; *Oakes v. Rogers*, 47 Minn. 38; 28 Am. St. Rep. 326, and note; and *Harrison v. Lebanon Water Works*, 91 Ky. 255; 34 Am. St. Rep. 180, and note.

JUDGMENTS—IMPEACHMENT FOR FRAUD.—A domestic judgment of a court, having jurisdiction of the subject matter and of the parties cannot be questioned collaterally for fraud *aliunde* the record by parties or privies: *Morrill v. Morrill*, 20 Or. 96; 23 Am. St. Rep. 95, and note; *Atkinsons v. Allen*, 12 Vt. 619; 36 Am. Dec. 361; *Mayor v. Brady*, 115 N. Y. 599. A court of equity will set aside a judgment for fraud when the party asking it is himself without fault, and has proceeded without unreasonable delay after the discovery of the fraud: *English v. Aldrich*, 132 Ind. 500; 32 Am. St. Rep. 270, and note.

ATTACHMENT—ABATEMENT BY DEATH OF DEFENDANT.—The levy of an attachment is not dissolved by the death of the defendant unless declared so by statute: *Mitchell v. Schoonover*, 16 Or. 211; 8 Am. St. Rep. 282, and note; *Van Kleeck v. Hammell*, 87 Mich. 599; 24 Am. St. Rep. 182; *Waitt v. Thompson*, 43 N. H. 161; 80 Am. Dec. 136, and extended note.

FIFIELD v. FARMERS' NATIONAL BANK.

[148 ILLIN IS, 163.]

FIXTURES.—MACHINERY PLACED IN A FACTORY WITH THE INTENTION THAT IT SHALL REMAIN as a part thereof, though attached by screws in such a manner that it may be removed, becomes a permanent fixture, and passes to a mortgagee of the premises, so that no lien or claim can be enforced in favor of the vendor of such machinery.

FIXTURES, TEST OF.—The chief test by which to determine whether an article is a fixture is to inquire whether the party annexing it intended it to be a permanent accession to the freehold. This intention is to be inferred from the nature of the article affixed, the relation and situation of the parties making the annexation, and the policy of the law in relation thereto, the structure and mode of annexation, and the purpose for which it was made.

FIXTURES—AGREEMENT WITH VENDOR DOES NOT AFFECT MORTGAGEE.—MACHINERY ANNEXED TO THE FREEHOLD IN SUCH A MANNER AND FOR SUCH A PURPOSE as to make it a fixture will not retain the character of personal property as against a mortgagee, because of an agreement between the vendor of the fixture and the owner of the freehold, that such fixture shall remain the property of the vendor until paid for, if the mortgagee had no notice of such agreement.

CHATTEL MORTGAGE—ESTOPPEL.—THE ACCEPTANCE OF A CHATTEL MORTGAGE on certain fixtures does not estop the mortgagee from insisting that they are real estate, and subject to a real estate mortgage made in his favor.

ACTION of replevin by C. S. Fifield and others for certain machinery sold by them to one Day, and placed in his factory, attached to the floor by benches and large screws, under an agreement between the plaintiffs and the owner of the building that such machinery shall remain the property of the vendors until paid for. On July 1, 1891, Robert Montgomery and others made a written contract with Day, agreeing to convey to him certain real property and pay him certain moneys, in consideration that he erect on such real property a factory building, put in it the necessary machinery, and equip it for use as a shoe factory, and that the deed to him of the premises should provide that the building and machinery should not be torn down or removed within five years. On July 15, 1891, the real property was conveyed to Day, and the conveyance, as recorded, contained a stipulation in harmony with the agreement. On November 23, 1891, and after the machinery had been placed in Day's factory, he, to secure indebtedness due the Farmers' National Bank, executed a trust deed of the lots upon which the factory was situated. In the following month judgments were entered against Day in favor of a large number of creditors. Before the machinery had been taken under a writ of replevin, the Farmers' National Bank filed a bill in equity, claiming a lien on the lots under the trust deed, and that the machinery had become a part of the real estate, and a receiver was appointed to take charge of the property, and the trial court, at the final hearing, decided that the machinery had become a fixture, and that the plaintiffs had no lien thereon and no right thereto. From this judgment the plaintiffs appealed.

Aldrich, Payne, and Defrees, for the appellants.

Owen G. Lovejoy, Richard M. Skinner, and George S. Skinner for the appellees.

168 **CRAIG, J.** The principal and indeed the only question of any importance presented by this record is, whether the machinery which Day purchased of appellants and placed in the manufacturing building, as shown by the evidence, became fixtures. If the machinery, when attached to the building, became fixtures and a part of the realty, then such

machinery passed to the bank under the trust deed executed by Day, and could not be taken under the writ of replevin sued out by the appellants.

It will be observed that the deed under which Day acquired title to the lots upon which the factory was erected provided that the building, improvements, and machinery to be placed on said lots shall not be torn down or removed from said premises by said grantee or his assigns for the space of at least five years from the first day of July, 1891, and that said lots shall be used for manufacturing purposes alone. This deed was executed July 15, 1891, and recorded July 25, 1891. When, therefore, appellants, in September, 1891, sold machinery to be placed in the building, they had notice of the contents of the deed, and, having such notice, they knew that the machinery to be placed therein, as a part of the plant, could not be removed at such time as they might elect, or at the will or pleasure of Day, the purchaser. Moreover, the agent of appellants who sold the machinery was at the factory ¹⁶⁹ between the 1st and 10th of September, after the factory building had been erected, and learned from Day the nature of the contract between him and the people of Wyanet, under which the factory was established, and hence they knew, or at least were in law chargeable with knowledge, that the machinery sold by them could not be removed from the factory.

But in addition to the provisions of the deed, the manner in which the machines were placed in the building manifests an intention that they should become fixtures, and remain there as a part of the shoe factory. Ten of the machines were fastened to the floor, or plank nailed to the floor, by large screws, and belted to the shafting overhead. Six were fastened to benches by wooden screws, and belted to the shafting, the benches having been nailed to the floor of the building. The witness Cass, who had charge of placing the machinery in the factory, testified: "None of the machinery was in at the time I went to Wyanet, and I superintended the placing of all of it, under Day's direction. It was all put in the building for the purpose of manufacturing shoes, and was all used for that purpose a little. The machinery purchased of Fifield was placed in the building for the purpose of manufacturing shoes, and increases the value of the plant. It was essential to the plant as placed there. The machinery is specially adapted to the manufacturing of shoes. Shoes can be manufactured without it, but it is necessary. I was

not employed to superintend a factory other than a shoe factory, and when I put the Fifield machinery in the factory it was not with the intention of taking it out."

Ewell on Fixtures states the rule for determining what are to be regarded as fixtures, as follows: "1. Real or constructive annexation of the thing in question to the realty; 2. Appropriation or adaptation to the use or purpose of that part of the realty with which it is connected; 3. The intention of the party making the annexation to make it a permanent accession to the freehold, this intention being inferred ¹⁷⁰ from the nature of the article affixed, the relation and situation of the party making the annexation, and the policy of the law in relation thereto, the structure and mode of the annexation, and the purpose or use for which the annexation has been made." The author also says: "Of these tests the clear tendency of modern authority seems to be to give pre-eminence to the question of intention to make the article a permanent accession to the freehold, and the others seem to derive their chief value as evidence of such intention."

In *Arnold v. Crowder*, 81 Ill. 56, 25 Am. Rep. 260, it was held that platform scales, fastened to sills laid upon a brick wall, for weighing stock or grain, as between mortgagor and mortgagee, are to be regarded as fixtures belonging to the realty. It is there said: "It is in the power of the owner of the inheritance to affix any property to it he pleases, and when he does so, it becomes a fixture in the general sense of the term, and part of the freehold, and if the inheritance be afterwards sold or mortgaged, the fixture goes with the freehold."

In *Dobschuetz v. Holliday*, 82 Ill. 371, it was held that a steam-engine, machinery, and fixtures, attached to the soil by a lessee thereof for the purpose of hoisting coal, including all boxes and other necessary appliances connected therewith, became a part of the lessee's estate therein. In that case it was contended that the engine was personal property, and hence a mechanic's lien could not be enforced, and it was, among other things, said: "Whatever may have been the private agreement of the parties, it is very clear the engine, when set up and attached to the realty as it was, became a part of the estate the lessee had in the premises. No doubt the parties could agree among themselves they would treat the engine and other fixtures as personalty, but their private agreement could not change the character of the property,

so far as third parties were concerned." So here, when the machinery was placed in the factory, and became attached, the private agreement made between Day and appellants, ¹⁷¹ to the effect that the machinery should remain the property of the vendor until paid for, could not change the character of the property so far as the rights of mortgagees or other lien creditors were concerned: See, also, *Wood v. Whelen*, 93 Ill. 153; *Thielman v. Carr*, 75 Ill. 385.

First National Bank v. Adam, 138 Ill. 483, is a case in point. There certain real estate and water-power were leased, and the lessee erected a paper-mill and placed therein all necessary machinery. After the mill was erected, and properly equipped with the necessary machinery, the lessee executed a trust deed on the property. The lessee failing to pay the rent, the lessor instituted proceedings to collect, relying on a clause in the lease which provided for the reservation of a valid and first lien to the lessor upon any and all goods, chattels, or other property belonging to the lessee, as security for the rent. But it was held that the mill, and buildings, and machinery, all formed a part of the leasehold estate, and were chattels real, and were a proper subject matter of a real estate mortgage, which, when made, creates a valid lien on the property: See, also, *Knapp v. Jones*, 143 Ill. 375.

The rule established in this state is fully sustained by the decisions in other states. In *Winslow v. Merchants' Ins. Co.*, 4 Met. 306, 38 Am. Dec. 368, in discussing the question in regard to what part of the property of a machine-shop would pass by a mortgage, the court said "that the steam-engine and boilers, and all the engines and frames adapted to be moved and used by the steam-engine, by means of connecting-wheels, bands, or other gearing, as between mortgagor and mortgagee, are fixtures, or in the nature of fixtures, and constitute a part of the realty, . . . and passed by the mortgage." The same doctrine was declared in *Pierce v. George*, 108 Mass. 78, 11 Am. Rep. 310. It is there said: "Articles placed in a mill by the owner to carry out the obvious purpose for which it was erected, and adapted to that purpose, are generally part of the realty, notwithstanding the fact that they could be removed and used elsewhere." The ¹⁷² same rule has been adopted in Maine: *Parsons v. Copeland*, 38 Me. 537. So in Iowa: *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57; 24 Am. Rep. 719. Michigan adopts the same rule: *Lyle v. Palmer*, 42 Mich. 314. See, also, *Taylor v. Collins*, 51

Wis. 123, and *Dudley v. Hurst*, 67 Md. 44, 1 Am. St. Rep. 368, where the same doctrine is declared.

In *Hill v. Farmers' Nat. Bank*, 97 U. S. 450, the question arose whether machinery in a paper-mill was part of the realty, and in deciding the case the court, among other things, said: "By placing it in the building, in constructing the mill, every part and parcel of it, as between mortgagor and mortgagee, became a fixture, and a part of the freehold."

Sword v. Low, 122 Ill. 487, has been cited, and is relied upon by the appellants. In the case cited an engine and boiler attached to the realty were held to be personal property. But upon an examination of the case it will be found that it was agreed between the vendor and purchaser, when the engine and boiler were sold, that the purchaser should execute and deliver a chattel mortgage on the property to secure the payment of the purchase money. In pursuance of this agreement a chattel mortgage was executed and placed upon record, as required by statute, thereby giving notice to third persons that the property was to be regarded as personal property. But here, however, no chattel mortgage was given to appellants. They relied solely upon a secret agreement, made between Day and themselves, that the property should belong to them unless paid for by Day. In the sale of a chattel, where the possession of the property passes to the purchaser, a secret lien in favor of the vendor is not valid as against creditors or subsequent purchasers: *Chickering v. Bastress*, 130 Ill. 206; 17 Am. St. Rep. 309.

Some importance is attempted to be placed on the fact, in the argument, that appellee, the Farmers' National Bank, took a chattel mortgage on the property. We do not regard this as an important element in the case. The fact that the bank ¹⁷³ may have been advised that the machinery was personal property, and attempted to secure its debt by taking a chattel mortgage thereon, would not impair the validity of the deed of trust or mortgage subsequently executed, nor would the acceptance of a chattel mortgage prevent the bank from resorting to any legal remedy it might have to secure its indebtedness. The real question was, whether this machinery, purchased by Day to be placed in the factory, and placed therein as a part and parcel of the plant, became a fixture. If it did, then it became a part of the realty, and was subject to the mortgage executed on the real property. Upon this question, under the authorities, we are satisfied that the

machinery, after being attached to the factory, became a part and parcel of the plant, and could not be taken on a writ of replevin.

The judgment will be affirmed.

Judgment affirmed.

FIXTURES—MACHINERY.—The intention of the owner in attaching machinery to land must be considered in deciding whether or not it becomes a fixture, and if it appears that he attached the machinery with a view to its remaining permanently, it must be treated as realty: *Roseville etc. Min. Co. v. Iowa Gulch Min. Co.*, 15 Col. 29; 22 Am. St. Rep. 372; *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519; 15 Am. St. Rep. 235; *Jones v. Bull*, 85 Tex. 136; *Smith v. Blake*, 96 Mich. 542; *First Nat. Bank v. Adam*, 138 Ill. 483. Machines placed in a building by a tenant, and fastened to the floor by bolts in such a manner as to be removable without injury to the building, do not become a part of the realty: *Bartlett v. Haviland*, 92 Mich. 552. See further on this subject the extended note to *Pierce v. George*, 11 Am. Rep. 314.

FIXTURES—TEST OF.—To determine whether a thing is a fixture or not we must look at the manner in which it is annexed, the intention of the person who made the annexation, and the purpose for which the premises are used: *Lavenson v. Standard Soap Co.*, 80 Cal. 245; 13 Am. St. Rep. 147, and extended note; *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519; 15 Am. St. Rep. 235, and note; *Miller v. Waddingham*, 91 Cal. 377; *Morey v. Hoyt*, 62 Conn. 542; notes to *Roseville etc. Min. Co. v. Iowa Gulch Min. Co.*, 22 Am. St. Rep. 376; *Hunt v. Mullanphy*, 14 Am. Dec. 303; and the extended notes to *Gray v. Holdship*, 17 Am. Dec. 686, and *Ottumwa etc. Mill Co. v. Hawley*, 24 Am. Rep. 726.

FIXTURES—SPECIAL AGREEMENTS WITH OWNER OR VENDOR.—The character of property as real or personal may be fixed by contract with the owner of realty when the article is placed in position, but such contract cannot affect the rights of a mortgagee or innocent purchaser without notice: *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519; 15 Am. St. Rep. 235, and note; *Tilbetts v. Horne*, 65 N. H. 242; 23 Am. St. Rep. 31, and note; *Muir v. Jones*, 23 Or. 332; *McFadden v. Allen*, 134 N. Y. 489. Compare *Campbell v. Roddy*, 44 N. J. Eq. 244; 6 Am. St. Rep. 889, and note.

GRAY v. MERRIAM.

[143 ILLINOIS, 172.]

A GRATUITOUS BAILEE IS LIABLE, AS A GENERAL RULE, FOR GROSS NEGLIGENCE ONLY.

A BANKER ACTING AS BAILEE, WITHOUT REWARD, IN THE CARE OF SPECIAL DEPOSITS is bound to exercise such reasonable care as men of common prudence usually bestow for the protection of their own property of similar character.

GROSS NEGLIGENCE AS APPLIED TO GRATUITOUS BAILEES is nothing more than the failure to bestow the care which the property in its situation demands.

A BANK WITH WHICH SECURITIES ARE DEPOSITED FOR SAFEKEEPING, and which is accustomed to receive such deposits, is liable for any loss thereof occurring through the want of that degree of care which good business men should exercise in keeping property of such value.

JURY TRIAL.—HARMLESS INSTRUCTION.—A judgment will not be reversed on an erroneous instruction when it appears affirmatively that the defeated party was not injured by the error.

A BANK HOLDING BONDS AS COLLATERAL IS NOT A GRATUITOUS BAILEE.

The bailment is for the mutual benefit of both the bailor and the bailee. **NEGLIGENCE.**—A BANKER ACCUSTOMED TO RECEIVE SPECIAL DEPOSITS, and who, on ascertaining that his assistant cashier, who had access to the special deposits, was speculating on the board of trade, made no examination to ascertain whether he was using moneys which did not belong to him, and, on again being warned of such speculations, made an examination of the books and securities of the bank, but no examination as to the special deposits, is guilty of gross negligence, and answerable for the special deposits stolen by such assistant.

BANKS AND BANKING.—EVIDENCE.—In an action against a banker for loss of a special deposit, evidence that the bonds deposited had originally been deposited as collateral security, though they were not so held at the time of the loss, together with evidence that the assistant cashier had access to the bonds up to a date after some of them had been abstracted, and that they were finally stolen by him, is admissible to show the relation of the parties, and to enable the jury to determine whether, under the circumstances, reasonable care had been exercised.

ACTION brought by Willard D. Merriam to recover the value of fifteen United States bonds left with the defendant for safekeeping, and claimed to have been lost through their negligence. They were engaged in the general banking business at Chicago, and the plaintiff Merriam had for several years before 1879 kept a running account with them, and had at times borrowed money of them. In February of that year he purchased twelve of the lost bonds through the agents of the defendants, and later in the same year bought the three others. In June of that year he borrowed of the defendants fifteen thousand dollars, and left all the bonds as collateral security. All the loans were, however, settled on, or prior to, March 19, 1881, at which time the defendants wrote to plaintiff inclosing his canceled notes, and advising him that they held on special deposit, subject to his order, the fifteen bonds, the subject of the controversy. Once or twice afterwards plaintiff borrowed small sums of the defendants, for which he gave his notes, and by the terms of which notes the bonds were also pledged as collateral security. These notes were paid during the year 1881, and plaintiff was not afterwards a debtor of the defendants. In the year 1882 the bonds were stolen by Frederick M. Ker, then acting as assistant cashier of the

defendants in their banking business. The bonds were tied together, and kept in a vault of the bank in the same safe in which the cash of the bank was kept, but in a separate compartment, and Ker and Mr. Kean, one of the managing partners of the defendants, were the only persons having access to the safe. The quarterly coupons for interest on the bonds were detached as they matured, and collected by the defendants, and credited to the general deposit account of the plaintiff. Ker had been in the employ of defendants for many years, advancing in such employment by regular gradations, but in the latter part of 1881, or the early part of 1882, rumors reached the defendants that he was speculating on the board of trade. Upon being questioned about it, he admitted the rumors to be true, but claimed that he was operating with his own money. At the trial the court instructed the jury, at the request of the plaintiff, that if they believed from the evidence that the defendants held the bonds exclusively for the benefit of the plaintiff, then the only obligation resting upon defendants was the exercise of reasonable and ordinary care over them; that what constituted such care was a question of fact for the jury, to be determined from all the evidence; that a person who holds or has charge of the property, under such circumstances, is required to exercise the care usually and generally deemed necessary in the community for the security of similar property under like circumstances, but nothing more; that the want of ordinary and reasonable care is, in law, termed gross negligence, and that if, from all the evidence, the jury believed that the defendants did not exercise over the bonds of the defendant reasonable and ordinary care, but were guilty of gross negligence in their keeping, and that by reason thereof the bonds were lost, the plaintiff was entitled to recover, and that, if their finding was in favor of the plaintiff, the damages should be assessed at the value of the bonds from the first day of December, 1882, and that interest might be added thereto up to the time of the trial. At the request of the defendants the jury was instructed that if they believed from the evidence that the bonds were held simply as a special deposit, and while so in the possession of the defendants they were lost or stolen, then that the jury should find for the defendants, unless they further believed from the evidence that the defendants were guilty of gross negligence or carelessness in the care of the bonds while in

their possession. Verdict and judgment in favor of the plaintiff, which judgment was affirmed by the appellate court.

Hoyne, Follansbee, and O'Connor, for the plaintiff in error.

Robert Hervey and C. Stuart Beattie, for the defendants in error.

185 **MAGRUDER, J.** The main error assigned is the giving of the first instruction given by the trial court for the plaintiff. It is claimed by plaintiff in error that the defendant bankers were gratuitous bailees, holding the bonds in controversy as a special deposit for safekeeping without reward. The general rule is, that a gratuitous bailee is liable only for gross negligence: Story on Bailments, 9th ed., secs. 62, 79; Schouler on Bailments and Carriers, 2d ed., sec. 35; *Skelley v. Kahn*, 17 Ill. 170. The instructions for both plaintiff and defendants require the jury to find that the defendants were guilty of gross negligence in the keeping of the bonds as a condition to the right of recovery. But the objection made to plaintiff's instruction is the definition which it gives of gross negligence in the use of the following clause: "The want of ordinary and reasonable care is in law termed gross negligence." Gross negligence has been defined to be the absence or want of slight care or diligence: Story on Bailments, secs. 62, 64; Schouler on Bailments and Carriers, secs. 15, 35; *Michigan Cent. R. R. Co. v. Carrow*, 73 Ill. 348; 24 Am. Rep. 248; *Chicago etc. R. R. Co. v. Johnson*, 103 Ill. 512. But the portions of the instruction which precede and follow said clause are in harmony with much of the language used in the text-books and decisions. Schouler, in his recent work on Bailments and Carriers, section 35, after announcing that the gratuitous bailee is liable only for slight care and diligence, according to the circumstances, and cannot be held for loss or **186** injury, unless grossly negligent, says: "This statement of the rule, though strongly buttressed upon authority, fails at this day of universal approval in our jurisprudence. . . . 'Slight,' 'ordinary,' and 'great' are terms they (some courts) wish to see discarded, and they prefer judging of each case by its own complexion." The same author states that in the main gross negligence is a question of fact upon all the evidence for the jury, and that what constitutes slight diligence or gross negligence will depend in each case upon a variety of circumstances, such as the occupation, habits, skill, and general character of the bailee, and local custom and busi-

ness usage: Schouler on Bailments and Carriers, secs. 49, 50. Story, after stating the rule that when the bailment is for the sole benefit of the bailor, the law requires only slight diligence on the part of the bailee, subsequently adds that, in every case, good faith requires a bailee, without reward, to take reasonable care of the deposit; "and what is reasonable care must materially depend upon the nature, value, and quality of the thing, the circumstances under which it is deposited, and sometimes upon the character and confidence and particular dealings of the parties": Story on Bailments, secs. 23, 62.

In *Smith v. First Nat. Bank*, 99 Mass. 605, 97 Am. Dec. 59, which was an action against a bank for the conversion or loss, by gross negligence, of valuable articles deposited with it as a bailee without hire, the court said: "This was a gratuitous bailment. The defendants are liable only for want of ordinary care."

A deposit is a naked bailment of goods to be kept for the bailor without recompense, and to be returned when the bailor shall require it, while a mandate is a bailment of goods without reward, to be carried from place to place, or to have some act performed about them: Story on Bailments, secs. 4, 5. But a mandatary, like a depositary, is said to be bound only to slight diligence, and responsible only for gross neglect: Story on Bailments, sec. 174. In *Skelley v. Kahn*, 17 Ill. 170, we held that ¹⁸⁷ "a mandatary or bailee who undertakes, without reward, to take care of the pledge, or perform any duty or labor, is required to use in its performance such care as men of common sense and common prudence, however inattentive, ordinarily take of their own affairs, and they will be liable only for bad faith, or gross negligence, which is an omission of that degree of care."

The liability of banks, acting as bailees, without reward, in the care of special deposits, has been recently considered in the case of *Preston v. Prather*, 137 U. S. 604; and it was there held that such bailees are bound to exercise such reasonable care as men of common prudence usually bestow for the protection of their own property of a similar character; that the exercise of reasonable care is in all such cases the dictate of good faith; and that the care usually and generally deemed necessary in the community for the security of similar property, under like conditions, would be required of the bailee in such cases, but nothing more. Gross negligence, as applied

to gratuitous bailees, is defined in that case to be "nothing more than a failure to bestow the care which the property in its situation demands"; and the court further says: "The omission of the reasonable care required is the negligence which creates the liability, and whether this existed is a question of fact for the jury to determine."

In the light of these more liberal views as to the liabilities of bailees without reward, we think that the clause in question, when considered in connection with the rest of the instruction, could only have been understood by the jury as referring to the want of such ordinary and reasonable care as was designated in the previous part of the instruction, that is to say, the care usually and generally deemed necessary in the community for the security of similar property under like circumstances. The rule, that a gratuitous bailee is responsible only for the want of care which is taken by the most inattentive, cannot be applied to all cases of bailment without reward. When securities are deposited with banks accustomed to receive ¹⁸⁸ such deposits, they are liable for any loss thereof occurring through the want of that degree of care which good business men should exercise in keeping property of such value: *Bank v. Zent*, 39 Ohio St. 105; 16 Am. & Eng. Ency. of Law, 160, 206.

But if it be conceded that the definition of gross negligence in the clause above quoted, even when considered in connection with the balance of the instruction, is technically inaccurate, it does not follow that plaintiff in error is entitled to a reversal of the judgment in this case. A judgment will not be reversed for error in an instruction when it appears affirmatively that the defeated party was not injured by the error. The absence of such injury is clearly manifest when the undisputed evidence establishes the correctness of the verdict, so that, either with or without the erroneous instruction, the verdict could not have been otherwise than it was, and, had it been otherwise, would have been set aside by the court: *Hall v. Sroufe*, 52 Ill. 421; *Burling v. Illinois Cent. R. R. Co.*, 85 Ill. 18; *Hubner v. Feige*, 90 Ill. 208; *Chicago etc. R. R. Co. v. Warner*, 108 Ill. 538; *United States Rolling Stock Co. v. Wilder*, 116 Ill. 100; *Town of Wheaton v. Hadley*, 131 Ill. 640.

The defendants in this case did a regular banking business. The plaintiff kept a deposit and check account with them. He borrowed money from them from time to time, and authorized them to hold the bonds in question as collaterals to secure the

notes given for such loans. While the bonds were thus held as collaterals, the character of the bailment was changed from a bailment for the exclusive benefit of the bailor to one for the mutual benefit of the bailor and bailee: *Preston v. Prather*, 137 U. S. 604. In ordinary cases of special deposits without reward the banker has no right to handle or examine the property except so far as its safety may require. But here the bankers had access to the package containing the bonds, and detached the interest coupons when they fell due, and collected the interest, and deposited it to the credit of the plaintiff, to be checked ¹⁸⁹ out by him in the regular course of business: *National Bank v. Graham*, 100 U. S. 699; *Whitney v. First Nat. Bank*, 55 Vt. 154; 45 Am. Rep. 598.

Ker, the assistant cashier of the bank, stole the bonds in the summer of 1882. He had access to these bonds and to the other special deposits kept by the bank in its vault. About a year before he absconded, Kean, the chief officer of the bank, had his attention called to the fact that Ker was speculating upon the board of trade in Chicago, and had a conversation upon the subject with him. Ker was not known to have any other property than his salary of eighteen hundred dollars. He was, however, allowed to retain his position in the bank, and no effort was made to verify the truth of the statements made as to his speculations, and no examination was made to ascertain whether he was using moneys which did not belong to him. About two months before he absconded, the subject of his speculations was again called to the attention of the chief officers of the bank through an anonymous communication, and Kean had a second interview with him in relation to his conduct in this regard. "The defendants then entered upon an examination of their books and securities, but made no effort to ascertain whether the special deposits had been disturbed": *Preston v. Prather*, 137 U. S. 604. The facts thus detailed are undisputed, and are established by the evidence of the defendants themselves.

In *Preston v. Prather*, 137 U. S. 604, an action was brought in the circuit court of the United States by parties in Missouri, doing business under the firm name of the Nodaway Valley Bank of Maryville, against the same bankers who are defendants in the present suit, to recover the value of United States bonds held as a special deposit, and stolen by the said Ker about the same time when he appropriated the bonds in controversy here. The Prather case was tried by agreement

before the federal circuit judge without a jury, resulting in judgment for the plaintiffs, and was taken afterwards to the supreme court of the United States, where the judgment rendered by ¹⁹⁰ the circuit judge was affirmed. The evidence in that case established substantially the same facts as are herein set forth. Those facts, which are here undisputed and supported by the testimony of the defendants, were there held by the federal supreme court to constitute such gross negligence as to make the defendants liable for the loss of the bonds; the court saying: "As stated above, the reasonable care which persons should take of property intrusted to them for safekeeping without reward will necessarily vary with its nature, value, and situation, and the bearing of surrounding circumstances upon its security. The business of the bailee will necessarily have some effect upon the nature of the care required of him; as, for example, in the case of bankers and banking institutions, having special arrangements, by vaults and other guards, to protect property in their custody. Persons, therefore, depositing valuable articles with them, expect that such measures will be taken as will ordinarily secure the property from burglars outside and thieves within; and that whenever ground for suspicion arises an examination will be made by them, to see that it has not been abstracted or tampered with; and, also, that they will employ fit men, both in ability and integrity, for the discharge of their duties, and remove those employed whenever found wanting in either of these particulars. An omission of these measures would, in most cases, be deemed culpable negligence, so gross as to amount to a breach of good faith, and constitute a fraud upon the depositor. It was this view of the duty of the defendants in this case, who were engaged in business as bankers, and the evidence of their neglect, upon being notified of the speculations in stocks of their assistant cashier, who stole the bonds, to make the necessary examination respecting the securities deposited with them, or to remove the speculating cashier, which led the court (below) to its conclusion that they were guilty of gross negligence. . . . In this conclusion we fully concur."

¹⁹¹ Inasmuch as the undisputed facts presented to the jury for their consideration on the trial below have been determined by the supreme court of the United States to amount to such gross negligence as will fasten liability upon a gratuitous bailee, we are disposed to hold that the verdict

of the jury was right, independently of the error in the instruction, and that it ought not to be disturbed: *Scott v. National Bank*, 72 Pa. St. 471; 13 Am. Rep. 711.

It is said that the trial court erred in admitting testimony showing that the bonds had been pledged as collateral security for loans made by the bank to the plaintiff at various times before they were stolen, and that the evidence should have been confined to the character of the bailment at the time of the loss in the summer or fall of 1882, as at the latter date all previous loans, for the security of which the bonds had been pledged, had been paid up, and they were then held merely as a special deposit. We think that this testimony, as well as that showing that Ker had access to the bonds for the purpose of cutting the quarterly coupons therefrom, as late as October, 1882, after some of them had been abstracted, was competent to show the relation of the parties to each other and to the property. As the reasonable care which the defendants were required to take of the bonds depended upon the situation and the bearing of surrounding circumstances, and the nature of the custody which they were allowed to exercise over the bonds, the extent to which they were permitted to have access to the bonds, under instructions by correspondence from the plaintiff, who lived in Iowa, either for the purpose of holding them as collaterals to notes, or for the purpose of detaching the coupons, had a direct bearing upon the question of their obligation to make examination when advised of the speculations of their assistant cashier.

The judgment of the appellate court is affirmed.

Judgment affirmed.

BANKERS—LIABILITY OF, AS BAILLES, FOR NEGLIGENCE.—This question will be found thoroughly discussed in *Isham v. Post*, 141 N. Y. 100; 38 Am. St. Rep. 766, and extended note.

BAILMENTS—NEGLECT—LIABILITY OF GRATUITOUS BAILLES.—A gratuitous bailee is liable only for fraud, or such gross negligence as amounts to fraud: *Hibernia Building Assn. v. McGrath*, 154 Pa. St. 296; 35 Am. St. Rep. 823, and note with the cases collected.

CONSOLIDATED TANK LINE COMPANY v. COLLIER.

[148 ILLINOIS, 259.]

DEBTS AND OTHER PERSONAL PROPERTY FOLLOW THE PERSON OF THEIR OWNER.

CONFLICT OF LAWS.—AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS MADE IN ANOTHER STATE by a resident thereof, with preferences among foreign creditors, if valid where made, is also valid in this state, unless detrimental to its citizens. Hence an assignment for the benefit of creditors, executed in Iowa, takes precedence over a garnishment subsequently levied in Illinois, at the instance of a resident of Ohio, to attach indebtedness due from a resident in Illinois to the assignor in Iowa.

CONFLICT OF LAWS—PLEADING STATUTES OF ANOTHER STATE.—A plea averring that certain designated persons of the state of Iowa, in conformity with the laws thereof, made and delivered two instruments in writing in words and figures, to wit, sufficiently avers the laws of that state as a matter of pleading.

SUIT by attachment, in which the Consolidated Tank Line, an Ohio corporation, sought to garnish certain debts due from residents of the state of Illinois to a firm engaged in business in, and being residents of, the state of Iowa. This firm, prior to the garnishment, executed two instruments in writing, by which they transferred all their property, including the indebtedness in question, to one J. F. Smith, a resident of Iowa, to hold and dispose of for the benefit of their creditors. Smith, by leave of the court, interpleaded in the action in Illinois, and therein attempted to assert his rights as assignee. The moneys garnished were paid into the bank subject to the order of the court. To the plea of Smith a demurrer was interposed by the Consolidated Tank Line, and was overruled in the circuit court, and thereafter judgment was entered thereon in favor of Smith, and the plaintiff prosecuted an appeal to the appellate court, where the judgment was affirmed, and a further appeal was then taken to the supreme court.

Craig, McCrary and Craig, and Sharp and Berry Brothers,
for the appellant.

James C. Davis, F. T. Hughes, and O'Harra, Scofield, and Hartzell, for the appellees.

262 PHILLIPS, J. The only question presented by this record is on the demurrer to the plea, and is a controversy between a citizen of the state of Iowa and a corporation of the state of Ohio, as to their right to get possession of certain

money owing a firm resident of the state of Iowa, by and from citizens of Illinois. The claim of appellant is derived through a proceeding by attachment, and notice, by publication, to the firm in Iowa, and garnishee proceedings against resident debtors, with personal service on them. Its claim must prevail, there being no controversy on the part of the resident garnishees, unless the facts set up in the plea of J. F. Smith, who interpleaded therein, show a superior right in himself.

That personal property follows the person of its owner is the rule of the common law and of this state, unless where modified by statute; and debts have no *situs* or locality, and alike follow the person to whom owing: *Cooper v. Beers*, 143 Ill. 25. Another general rule is, that a contract ²⁶³ valid in the country where made is valid every where. This rule is a principle of comity among civilized states, based on enlightened principles of jurisprudence. A nonresident debtor may make a voluntary assignment, with preferences among foreign creditors, and if valid in the state where made will transfer property in this state, and will be held valid here, unless it be detrimental to citizens of this state: *May v. First Nat. Bank*, 122 Ill. 551; *Woodward v. Brooks*, 128 Ill. 222; 15 Am. St. Rep. 104.

If the indebtedness sought to be garnished in this case could be assigned or transferred to another by Collier, Robertson, and Hambleton, according to the laws of the state of Iowa, and such assignment be valid there, it would be held valid here in any controversy between citizens of that state and citizens of any other foreign state who may seek to recover the same by proceeding by attachment. The language in *Woodward v. Brooks*, 128 Ill. 222, 15 Am. St. Rep. 104, of a different import, was inadvertently used. Whilst a transfer or mortgage of an account may be valid in Iowa, that would not, under the principles of comity, be allowed to affect a transfer, as a mortgage of the garnisheed account, to the detriment of a citizen of this state who was a creditor of Collier, Robertson, and Hambleton, and who had sued out the attachment writ and proceeded by garnishment, as here; yet to hold that such transfer, valid in the state of Iowa, should not transfer this indebtedness as against a citizen of Ohio, who attached and garnisheed here, would be to give the citizen of Ohio all the protection and benefits of a citizen of this state, and a different comity towards citizens of different foreign states would be thus made to prevail.

That an account for money due may be sold or mortgaged is the settled rule of Iowa. In the recent case of *Sandwich Mfg. Co. v. Robinson*, 83 Iowa, 567, it was held: "It is claimed by appellant that the description is insufficient, for the reason that a demand for money not earned cannot be mortgaged. We do not think the claim is well founded. As ²⁶⁴ a general rule, every species of personal property which may be sold, and which has an actual or prospective existence, may be mortgaged. It is the well-settled rule in this state, that a valid mortgage may be given on personal property not owned by the mortgagor, and not then in existence, if he afterwards acquire it. That rule has been applied to additions to stocks of merchandise: *Scharfenburg v. Bishop*, 35 Iowa, 63; *Stevens v. Pence*, 56 Iowa, 258. It has also been applied to crops to be planted and grown: *Norris v. Hix*, 74 Iowa, 525; *Wheeler v. Becker*, 68 Iowa, 723; *Fejavary v. Broesch*, 52 Iowa, 88; 35 Am. Rep. 261. The right of a railroad company to mortgage its future earnings was affirmed in *Jessup v. Bridge*, 11 Iowa, 575, 79 Am. Dec. 513, although the decision was founded, to some extent, on considerations of public policy: See, also, *Dunham v. Isett*, 15 Iowa, 293. The principles which govern the cases cited are applicable to the one under consideration. That an account for money due may be sold cannot be questioned, and an interest in such an account, less than an unqualified ownership of it, may be transferred. Since a valid mortgage may be given on merchandise not in existence, and on crops neither grown nor planted, we must hold that one may be given on a claim for money not earned. In such cases the mortgage attaches to the property designed to be included therein when it is brought into existence."

The substantial averments of the plea are, that "prior to December 10, 1890, the copartnership of Collier, Robertson, and Hambleton was engaged in business in the city of Keokuk, Lee county, Iowa; that while so engaged, sundry persons, residents of Hancock county, Illinois, became indebted to the said firm, which indebtedness was evidenced by open accounts on the books of said firm; that on said tenth day of December, 1890, said firm of Collier, Robertson, and Hambleton, by two certain instruments in writing, transferred and set over to J. F. Smith, as trustee, certain personal property, to secure to the beneficiaries therein named sundry debts due and owing ²⁶⁵ to the firm of Collier, Robertson, and Hambleton, the description, as applied to choses in action, in the first con-

veyance, being as follows, to wit: 'Also all notes and accounts belonging to the grantors, whether in process of collection or not, . . . the intention being to convey all personal property, choses in action of the grantors, as fully as if each item was mentioned, and including all books of account and the accounts therein contained'; and in the second instrument occurs the following: 'Also all notes, accounts, account books, and accounts therein, including judgments, belonging to said firm, and including all the property in and about said premises, belonging to the grantors, whether named herein or not'; that each of said instruments was, on the day of its execution, filed for record in Lee county, Iowa, at Keokuk; that the Consolidated Tank Line Company had not only constructive notice of the existence of said instruments as given by the fact of recording, but also had actual notice of the acknowledgment, execution, and delivery of the same; that under and by virtue of said instruments, and under and by virtue of the laws of the state of Iowa, there was transferred and set over unto J. F. Smith, as trustee, the debts due from the several garnishees in this case; that under and by virtue of said instruments in writing said J. F. Smith, as trustee, took possession of the books of account and evidences of indebtedness from the said several garnishees, and prior to the service of garnishment in this case notified each of said several garnishees that said several sums due from said garnishees to said Collier, Robertson, and Hambleton had been assigned, conveyed, and transferred to J. F. Smith, trustee, and that he was entitled to receive the said sums due from said several garnishees; that said Smith accepted the trust created by said instruments, and at once took the open and manual possession of the property described in said instruments, and control of the evidences of the indebtedness of the several garnishees to the firm of Collier, Robertson, and Hambleton; that the Consolidated ²⁶⁶ Tank Line Company is engaged in business in the city of Keokuk, and the claim sued on by it grows out of a transaction arising in the state of Iowa."

Appellee insists that the plea is uncertain and insufficient; that it fails to set out the laws of the state of Iowa, and fails to show the mortgages were properly executed, according to law. The objection that the instruments were not properly executed, they being set out in *hæc verba*, is, that they are

signed in the firm name, and the acknowledgment thereof to the first is:

"STATE OF IOWA, }
Lee County. } ss.

"Be it remembered, that on this tenth day of December, 1890, before me, Nannie Smith, notary public in and for said county, personally appeared Collier, Robertson, and Hambleton, by Hugh Robertson, of said firm, personally known to me to be the identical person who signed the name of said firm to the above mortgage as mortgagors, and to be a member of said firm, and acknowledged the execution thereof to be the voluntary act and deed of said firm for the purpose therein expressed, and on the same day the other members of said firm acknowledged the execution of said instrument to be the voluntary act and deed of said firm."

And the acknowledgment of the second is:

"STATE OF IOWA, }
Lee County. } ss.

"Be it remembered, that on this tenth day of December, 1890, before me, Nannie M. Smith, a notary public in and for said county, personally appeared Collier, Robertson, and Hambleton, by each one of said firm, and who are personally known to me to be the identical persons who signed this mortgage, and to be a member of said firm, and one of whom who signed the name of said firm to the above mortgage as mortgagors, and acknowledged the execution thereof to be the voluntary act and deed of said firm for the uses and purposes therein expressed."

²⁶⁷ And both signed by the notary public, with seal attached. The plea contains this averment: "Which instruments of writing were on the same day, to wit, December 10, 1890, duly acknowledged and delivered, in accordance with the laws of the state of Iowa," etc. That averment was a sufficient averment of the sufficiency of the acknowledgment under the laws of the state of Iowa, in pleading.

But whether regarded as mortgages or an equitable assignment of the accounts, we hold, that with the notice that the plaintiff had, as averred in the plea, and from the intentions of the parties, as they may be gathered from the instruments themselves, it was the intention of the firm to convey the accounts in trust for security, and was an equitable assignment of them, of which appellant had notice, as well as did

the garnishees, and such equitable assignment should receive the protection of a court of law in that character of proceeding: *Carr v. Waugh*, 28 Ill. 418.

Without determining the sufficiency of the acknowledgment under the laws of the state of Iowa, but recognizing the rule in that state, as declared in *Sandwich Mfg. Co. v. Robinson*, 83 Iowa, 567, that an account or interest therein may be sold, we hold that the sufficiency of the acknowledgment as pleaded is in conformity with the laws of the state of Iowa, and, by reason of the equitable assignment, the objection that the instruments were not properly executed is not well taken. The plea avers that "Collier, Robertson, and Hambleton, in said county of Lee, and state of Iowa, and in all respects in conformity with the laws of the state of Iowa, made and delivered to this interpleader, James F. Smith, who is a citizen and resident of said state of Iowa, two instruments of writing, in words and figures to wit." That averment sufficiently avers the laws of the state as a matter of pleading. The demurrer was properly overruled.

The judgment of the appellate court is affirmed
Judgment affirmed.

CONFLICT OF LAWS—LEX DOMICILII.—The *situs* of debts and obligations is at the home of the owner: *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209; 34 Am. St. Rep. 448, and note; note to *Missouri Pac. Ry. Co. v. Sharitt*, 19 Am. St. Rep. 145. See, also, *Wabash R. R. Co. v. Dougan*, 142 Ill. 248; 34 Am. St. Rep. 74, and note. Personal property is also subject to the law of the owner's domicile: *Cross v. United States Trust Co.*, 131 N. Y. 330; 27 Am. St. Rep. 597, and note; *Richardson v. De Giverville*, 107 Mo. 422; 28 Am. St. Rep. 426, and note with the cases collected.

CONFLICT OF LAWS.—VALIDITY OF FOREIGN ASSIGNMENTS FOR THE BENEFIT OF CREDITORS: See the note to *Chipman v. Peabody*, 38 Am. St. Rep. 440, where the cases are collected; and see, also, *Barth v. Backus*, 140 N. Y. 230; 37 Am. St. Rep. 545, and note.

MONMOUTH MINING AND MANUFACTURING COMPANY v. ERLING.

[148 ILLINOIS, 521.]

A MASTER IS BOUND TO EXERCISE REASONABLE CARE AND DILIGENCE IN PROVIDING AND KEEPING IN REPAIR SAFE TOOLS AND MACHINERY FOR HIS SERVANT'S USE. A servant, therefore, has the right to presume such tools and machinery are safe, and will be kept in repair.

MASTER AND SERVANT.—THE DUTY RESIDES IN THE SERVANT TO OBSERVE WHETHER MACHINERY FURNISHED HIM IS IN REPAIR, AND TO REPORT TO THE MASTER IF IT IS NOT.

A MASTER CANNOT DELEGATE TO A SERVANT THE DUTY OF SEEING THAT MACHINERY WITH WHICH OTHER SERVANTS MUST WORK IS REASONABLY SAFE, so as to relieve himself from liability for the negligence of the servant to whom such duty is delegated.

MASTER AND SERVANT.—IF MACHINERY WITH WHICH SERVANTS WORK IS OUT OF REPAIR AND IN A DANGEROUS CONDITION FOR MORE THAN TWO WEEKS THE MASTER MUST BE CHARGEABLE WITH NEGLIGENCE IF THE SUPERVISION EXERCISED BY HIM OR HIS AGENTS HAS BEEN SUCH THAT HE DOES NOT KNOW OF THE CONDITION OF SUCH MACHINERY.

MASTER AND SERVANT.—CONTRIBUTORY NEGLIGENCE.—A SERVANT INJURED BY MACHINERY BEING OUT OF REPAIR, AND IN A DANGEROUS CONDITION, IS NOT CHARGEABLE WITH CONTRIBUTORY NEGLIGENCE IF HE HAD NO ACTUAL NOTICE OF THE WANT OF REPAIR, AND HIS DUTIES DID NOT REQUIRE HIM TO BE IN CHARGE OF THE MACHINERY, AND HIS LABOR WAS ONLY INCIDENTAL TO IT.

MASTER AND SERVANT.—FELLOW-SERVANTS.—A SERVANT DOES NOT ASSUME THE RISK OF THE NEGLIGENCE OF A FELLOW-SERVANT IN USING DEFECTIVE MACHINERY.

JURY TRIAL.—IMPROPER ARGUMENT.—If counsel, in arguing before the jury, improperly calls attention to the financial condition of the parties, and, on objection being made, the court tells him to keep within the record, and he thereupon desists from his improper course, the judgment will not be reversed unless it appears that the losing party was injured by such reference.

JURY TRIAL.—THE TIME FOR ARGUMENT BEFORE THE JURY MAY BE LIMITED BY THE COURT.

A MASTER IS NOT ANSWERABLE FOR INJURY TO HIS SERVANT RESULTING FROM NOT ADOPTING THE BEST AND SAFEST MACHINERY, IF THAT WHICH HE DID EMPLOY WAS REASONABLY SUITABLE AND PROPER FOR THE BUSINESS, BUT AN ERROR IN ADMITTING EVIDENCE UPON THIS SUBJECT IS MADE HARMLESS BY AN INSTRUCTION TO THE JURY THAT THE DEFENDANT WAS NOT BOUND TO FURNISH THE VERY BEST AND MOST IMPROVED MACHINERY, NOR THAT WHICH WAS ABSOLUTELY SAFE.

Kirkpatrick and Alexander, for the appellant.

J. A. McKencie, for the appellee.

527 PHILLIPS, J. It is first insisted that there is no evidence of negligence on the part of the defendant. The principle is fully established as a rule of law, that the master is

bound to exercise reasonable and ordinary care and diligence in providing and keeping in repair safe tools and machinery for the servant's use. With this duty resting on the master, the servant accepting employment accepts it with the assumption that that duty will be complied with by the master, and has a right to assume that tools and machinery furnished for his use are safe, and will be kept in repair. The duty rests on the servant to observe whether machinery furnished him is in repair, and to report to the master if it is not.

The rod and hook attached to the eyebolt, and fastened to the lever by nuts on the eyebolt, were the means of fastening the lever in place which was used to throw the machinery out of gear. Only when the lever was fastened down by this hook thus attached, if the power was in motion, was it safe for the servants to enter the pans to throw the clay therefrom. Whilst so in the pans, for the hook to become unfastened, or from any cause the lever to fly up, which it would do unless fastened down, was attendant with serious danger to the men in the pans. Such being the fact, the means of fastening that lever down was a part of the machinery that required supervision of the highest kind, and a most strict compliance with the duty of the master. The danger that would arise from defective fastening of that lever was known on the most superficial observation of the manner of its working. The manner ⁵²⁸ in which the eyebolt was fastened to the lever was by passing it through a hole near the end of the lever, and then putting on nuts to hold the eyebolt in place. For that purpose two nuts were used on the same bolt, as by so doing the nuts were less likely to jar loose and allow the bolt to pull out of the lever. One of these nuts had been off for more than two weeks, and the remaining one was therefore more likely to come off the bolt by reason of the jarring of the machinery. This result actually occurred, and caused the injury to plaintiff. The duty of defendant was to see that it was reasonably safe, and that was a continuing duty, that required supervision and inspection. If it was out of repair for a length of time that with proper supervision and inspection it could reasonably have been known and remedied, then negligence existed in not exercising that supervision and inspection. Whilst the defendant had in its employ a machinist, whose duty it was to look after the machinery and do the repairing, yet that would not relieve the defendant from liability, as its duty was a permanent, continuing one, that could

not be delegated to another, so as to relieve it from liability because of the negligence of that other to whom that power and duty were delegated: *Chicago etc. Ry. Co. v. Jackson*, 55 Ill. 492; 8 Am. Rep. 661; *Chicago etc. Ry. Co. v. Swett*, 45 Ill. 197; 92 Am. Dec. 206; *Chicago etc. R. R. Co. v. Avery*, 109 Ill. 314; *Columbus etc. Ry. Co. v. Troesch*, 68 Ill. 545; 18 Am. Rep. 578; *Moynihan v. Hills Co.*, 146 Mass. 586; 4 Am. St. Rep. 348. Defendant's contract with the servant was that it would exercise reasonable and ordinary care and diligence in providing and keeping in repair safe tools and machinery for the servant's use, and the machinery being out of repair for the length of time shown by this evidence, if its condition was not actually known by the master, it was ignorant of it through its own negligence or want of care. It knew, or ought to have known, the defects which caused the injury: *Schooner Norway v. Jensen*, 52 Ill. 373.

⁵²⁹ It is urged that the plaintiff himself did not exercise due care, and in support of this contention it is insisted that he had actual notice of the defective machinery, or by the exercise of diligence might have known of it, and neither gave notice to the defendant nor abandoned the work. The actual notice of the defects is sought to be brought home to him mainly by testimony as to his declarations, made after the accident, as to the cause of the injuries to him. He denied all knowledge, and claimed those statements were made on information received after the accident. His duties did not require him to be in charge of the machinery, and his labor was only incidental to it, so that it cannot be held that the want of knowledge on his part was negligence. But however this may be, the verdict of the jury was against this contention of appellant, and the affirmance by the appellate court of the judgment entered on that verdict is conclusive on this court that the plaintiff did not have actual notice of the defects of the machinery, nor was he guilty of negligence in not becoming aware of the defect.

It is argued by appellant that Costello, who was in charge of the machinery, and had knowledge of its defects, was the fellow-servant of plaintiff, and that his running the machinery in its defective condition, with reference to the lever, was the negligence of a fellow-servant that would defeat a recovery in this case, and counsel cite *Philadelphia Iron and Steel Co. v. Davis*, 111 Pa. St. 597; 56 Am. Rep. 305; *Shaffer v. Haish*, 110 Pa. St. 575, and *Moynihan v. Hills Co.*, 146 Mass. 586; 4 Am.

St. Rep. 348, as sustaining that view. On considering those cases we do not find them supporting appellant's claim on this question. The case of *Shaffer v. Haish*, 110 Pa. St. 575, was where plaintiff was engaged in operating a machine for defendant, and it is said in that case: "It was the duty of the defendants to furnish those in their employ with ordinary machinery, such as, with reasonable care, may be used with safety," and then proceeding to the direct question involved in that case, the court further say: "Was the machine ⁵³⁰ defective in its original construction, or had it become so by reason of use or other cause? There was certainly no evidence as to the first proposition. It was claimed, however, that the machine was defective and unsafe at the time the injury occurred." The court, then, reviewing the evidence, finds that the last proposition was not sustained, so that plaintiff was not entitled to recover.

In the case of *Philadelphia Iron and Steel Co. v. Davis*, 111 Pa. St. 597, 56 Am. Rep. 305, the complaint was that the injury was sustained from the breaking of a flywheel, which, as alleged, was negligently constructed, out of repair, and unskillfully repaired. It appears that the flywheel weighed between four and five tons, and two clamps were placed by the superintendent—the managers and others having been consulted—for the purpose of preventing its sliding along the shaft, to which it had a tendency. Plaintiff was working in the mill between two and three o'clock on the morning of June 27th when one of the clamps flew off. The engine was stopped, and some repairs made, and again started up with but one clamp. The superintendent of the works was not informed of the accident, though in the works at the time. Between five and six o'clock the remaining clamp gave way, and injured the plaintiff. The court held that had the injury to the plaintiff occurred on the breaking of the first clamp, the responsibility would have rested altogether with the defendant, for it could not have charged its engineer with the knowledge of the unsafety of an appliance which had been regarded as sufficient by its superintendent. The engineer had notice of the danger, and continued to run the engine without notice to the defendant, and the defect occurred within so short a time previous to the accident that no negligence could be imputed to the defendant in not knowing of the defect. The court in that case further held, the proximate cause of the injury was the carelessness of a fellow-

servant. Had the master in that case knowledge of the breaking of the first clamp, and ordered or permitted ⁵³¹ the engine to run in the condition it was after the first breakage, a very different question would have been presented.

In *Moynihan v. Hills Co.*, 146 Mass. 586, 4 Am. St. Rep. 348; the court stated very fully and clearly the rules applicable to the implied contract created by the hiring, whereby the master undertakes to use proper care in providing safe tools and appliances; and the limit within which the delegation of that duty is inconsistent with his duty, and the extent and circumstances within which any part of that duty may be delegated to a servant in keeping tools or appliances in repair, and the following propositions are stated: "First, there is that class of cases in which the condition of a machine as to safety is constantly changing with its use, so as to require from the persons tending it, as a part of the ordinary use of it, reconstruction or readjustment of parts, as they become worn out or displaced, from materials or new part supplied by the master for that purpose. Such work is a part of the regular business of the servant in using the machine, and not of the master in maintaining it. Negligence in doing it is, as to all other employees, negligence of a fellow-servant. So far as the condition of the machinery depends upon this kind of attention, the master does his duty if he employs competent and suitable persons, and supplies them with every thing needed for their work. A second class of cases includes those in which repair or reconstruction of a machine is necessary, of such a kind as is commonly done, or may properly be done, under the direction of the master, by servants engaged in the general business. Both parties to the contract must be presumed to have contemplated that such work would be done by fellow-servants of the employee, and he must therefore be held to have assumed all risks from their negligence in doing it. But this, it must be remembered, is a part of that work for the results of which, in the completed machine, the master agrees to hold himself responsible, so far as good results can be insured by his exercise of proper care, and so he is bound to bring to this department of the ⁵³² business, either in his own person or by an agent, such intelligence, skill, and experience as is reasonably to be required in one to whom, in an important particular, the safety of others is intrusted, and he is bound also to be reasonably diligent and careful in the use of his faculties. One who represents him in this field

is not acting as a fellow-servant with his other employees, within the meaning of the rule which we are considering, but is his agent or servant, for whose care and diligence he is accountable. There may be still a third class of cases, in which a machine is of such a kind, and the nature of the business in which it is used is such, that the parties could never reasonably have contemplated that any servants employed in the business would build or reconstruct it. A proprietor might buy such a machine, or send an agent or servant to buy it. In either case, the purchase would be in the line of the master's duty, and he would be liable for the consequences of negligence in making it. He might hire privileges and men in a machine-shop in a distant city, and build it there. His servants in that work would not be fellow-servants with an employee engaged in an entirely different business, and under the doctrine of *respondeat superior* he would be held liable for the consequences of their negligence. If he saw fit to construct or reconstruct it, in the same way, in or near the building in which it was to be used, the result would be the same. Upon our hypothesis it would be inconsistent with his implied contract to employ fellow-servants of his employees in this work, and he therefore could not relieve himself from his general obligation, as to the safety of his machinery, by setting up that his servants in the construction or reconstruction were fellow-servants with his employees in the business in which it was to be used."

This case must fall within the limits of the first rule, the evidence in this record showing the loss of a nut, with the circumstances showing it to have been the duty of the master to know of that fact. There is an entire absence of evidence ⁵³³ showing the master to have furnished a nut to take the place of that lost, as was his duty, and however trivial the cause of the injury, the injury itself or liability is not lessened; and though two nuts were found after the injury near the lever, yet it is not shown that both belonged to the eye-bolt.

The cases cited are not inconsistent with what was held in *Chicago etc. Ry. Co. v. Swett*, 45 Ill. 197, 92 Am. Dec. 206, and *Columbus etc. R. R. Co. v. Troesch*, 68 Ill. 545, 18 Am. Rep. 578, that "the doctrine that an action by a servant will not lie against his principal for an injury sustained through the fault of a fellow-servant applies only to cases where the injury complained of occurred without the fault of the principal,

either in the act which caused it, or the employment of the person who committed it." Even if Costello and the plaintiff were fellow-servants, the fault in the master in not exercising proper care in providing means for repairing the machinery was such that it would not defeat a recovery. Costello having knowledge of the defects, not communicated to the plaintiff, and the fact appearing that Costello, without objection or notification to defendant, operated defective machinery, the law would be that a coservant, although he has assumed the risk of negligence on the part of his coservants, cannot be said to have assumed the risks incident to their negligence in using defective machinery.

In the argument of a case of this character the financial condition of the parties to the suit is not a question for the jury, and remarks of comparison in that behalf, in argument, are improper, and deserving condemnation. The remarks of counsel for plaintiff, in the closing argument, were of this character, and went further, and when the attention of the court was called thereto, counsel was directed to "keep within the record." Questions of this character have been before this court in different cases, notably in *Chicago etc. R. R. Co. v. Johnson*, 116 Ill. 210, and *Felix v. Scharnweber*, 119 Ill. 448, in each of which it was held the remarks in the particular ⁵³⁴ case were not of a character to require reversal. Cases may arise where the impropriety and probable effect of such language in argument, of itself, would be cause for reversal, on the mere objection of a party to the suit and the incorporation of it in the record; but where the language falls short of being of that character that result would not necessarily follow. In this case, on the objection being made, and counsel being directed by the court that he must keep within the record, that was a ruling by the court on the question, and it not appearing that the defendant was in any way injured, it must be held the language used in argument here is not reversible error.

It is assigned as error that the court limited the time for argument before the jury to one hour and thirty minutes to each side. It is clearly within the legal discretion of the court to limit the time for argument, and nothing in the facts presented by this record, either in the points involved or the testimony to be reviewed, shows the time limited was unreasonable. However, neither an objection nor exception to the action of the court in this regard is in this record.

In the second count of the declaration the words "plaintiff" and "defendant" were in some portions of the count transposed, and in other parts properly used. It is apparent from the context of that count that the transposition was a clerical error, and was clearly amendable on trial or after verdict. If instead of the words "plaintiff" and "defendant" the names of the parties had been inserted in that count, it would have literally come within the terms of the tenth subdivision of section 6, chapter 7, of the Revised Statutes, entitled, "Amendments and Jeofails," and by construction we hold it as within that provision, and not cause for reversal.

The second instruction asked by defendant was, that the jury should disregard the second count as not sufficient on which to base a verdict. That instruction was refused, to which the defendant excepted. We hold that instruction was properly refused, as the clerical error was of that character ⁵³⁵ that the count was sufficient on which to base a verdict and sustain a judgment.

Other instructions were given and modified, being so given and modified in accordance with the rules applicable as here stated. We find no error in giving and modifying instructions.

Certain instructions asked by defendant were refused, which is assigned as error. The instructions did not state a correct rule of law, and were inapplicable to the facts presented. We find no error in the refusal of instructions.

Objection was made on the trial by defendant's counsel to certain questions put on cross-examination of defendant's witness, by appellee's counsel, the tendency of which was to show there was a safer way to secure the nuts on the bolt and retain it in place. These questions were objected to, and overruled. These questions were improper. The issue was not whether the master might not have provided better machinery or inventions, or a better fastening for the bolt, but whether that employed was reasonably suitable and proper for the business. He is not compelled to adopt every new invention, or pretended or actual improvement, new or old. We hold these questions were improper, and the ruling on the objection thereto erroneous. But by the fifth instruction asked and given for defendant, the jury were instructed that an action could not be maintained by plaintiff, because there was a safe mode in which the business might have been conducted, the adoption of which might or would have pre-

vented the injury. By the tenth instruction given for defendant, the jury were instructed that the defendant was not bound to furnish the very best or most improved kind of machinery to be used in the business in which it was engaged, nor compelled to furnish machinery that was absolutely safe. By these instructions the improper evidence brought out on the cross-examination of the witness was obviated.

From a careful examination of the record we find no reversible error. The judgment is affirmed.

Judgment affirmed.

MASTER AND SERVANT.—A MASTER MUST EXERCISE REASONABLE SKILL AND CARE in furnishing machinery and appliances suitable for the servant's use in the work to be done: *Orman v. Mannix*, 17 Col. 564; 31 Am. St. Rep. 340, and note; *Kehler v. Schwenk*, 151 Pa. St. 505; 31 Am. St. Rep. 777, and note; *Daves v. Southern Pac. Co.*, 98 Cal. 19; 35 Am. St. Rep. 133; *Ragon v. Toledo etc. Ry. Co.*, 97 Mich. 265; 37 Am. St. Rep. 336; *Louisville etc. Ry. Co. v. Utz*, 133 Ind. 265; *Steinhauser v. Spraul*, 114 Mo. 551. See, further, the note to *Sullivan v. Hannibal etc. R. R. Co.*, 28 Am. St. Rep. 396.

MASTER AND SERVANT—SERVANT'S DUTY TO NOTIFY MASTER AS TO DEFECTS.—A servant having knowledge of defects in the appliances furnished him should notify his employer, and, if he does not do this, he continues his work at his own risk: *Ragon v. Toledo etc. Ry. Co.*, 97 Mich. 265; 37 Am. St. Rep. 336, and note with the cases collected; *Linesoki v. Susquehanna Coal Co.*, 157 Pa. St. 153; *Herdman-Harrison Milling Co. v. Spehr*, 145 Ill. 329. But see *Welsh v. Alabama etc. Ry. Co.*, 70 Miss. 20.

MASTER AND SERVANT.—LIABILITY FOR VICE-PRINCIPAL'S NEGLIGENCE WITH REGARD TO MACHINERY: *Sullivan v. Hannibal etc. R. R. Co.*, 107 Mo. 66; 28 Am. St. Rep. 388, and note; *Orman v. Mannix*, 17 Col. 564; 31 Am. St. Rep. 340, and note; *Roux v. Blodgett etc. Lumber Co.*, 94 Mich. 607; *Daniels v. Chesapeake etc. Ry. Co.*, 36 W. Va. 397; 32 Am. St. Rep. 870.

MASTER AND SERVANT—MASTER'S DUTY TO FURNISH BEST APPLIANCES IN USE.—A railway company need not furnish machinery of the very best kind for the use of its servants; but it must not use appliance of a pattern which ordinary inspection would show to be defective: *Mason v. Richmond etc. R. R. Co.*, 111 N. C. 482; 32 Am. St. Rep. 814, and note with the cases collected.

VAN MATRE v. SANKEY.

[148 ILLINOIS, 586.]

ADOPTION—RESIDENTS.—A statute authorizing the adoption of a minor child by a resident of a county or state includes a temporary resident. A petition for such adoption may, therefore, be presented to, and heard and determined by, a proper court of any county of which the petitioner is a temporary resident, though he may at the same time be a citizen of another state.

STATUTORY CONSTRUCTION.—If a statute of a state has been construed by its highest judicial tribunal, such construction will ordinarily be received as conclusive in the courts of other states.

ADOPTION—CONSENT.—The adoption of a minor without the consent of the relatives of her deceased mother, and against the opposition of the child's guardian, is valid, if the court finds that the best interest of the child will be promoted by such adoption, and the relatives of the deceased father consent, and the guardian is removed on the day of the entry of the order of adoption, and the adopting parent appointed in his stead.

ADOPTION.—THE FAILURE OF THE COURT TO APPOINT A GUARDIAN AD LITEM, or next friend, to represent a minor in proceedings for its adoption, cannot render the order of adoption void on a collateral attack.

ADOPTION—ESTOPPEL.—NEITHER AN ADOPTING PARENT NOR HIS HEIRS OR REPRESENTATIVES after his death can question the validity of the order of adoption of a minor child procured at his instance and with his consent.

AN ORDER ADOPTING A CHILD ENTERED IN ANOTHER STATE by a court having jurisdiction of the parties and of the subject matter, cannot be impeached in this state by showing irregularity in the procedure or error in the rendition of the order.

AN ORDER ADOPTING A MINOR CHILD FIXES THE STATUS OF THE CHILD and the adopting parent toward each other, and must be held conclusive upon the parties and their privies until reversed or set aside in the jurisdiction in which it was rendered.

THE JURISDICTION OF AN APPELLATE COURT OF ANOTHER STATE which has rendered a judgment upon appeal affirming an order of a subordinate court, must be presumed.

RES JUDICATA—ADOPTION PROCEEDINGS.—A PROCEEDING FOR THE REVOCATION OF AN ORDER ADOPTING A MINOR CHILD is not of so summary a character that it will not be treated as *res judicata*, and therefore as conclusive upon the rights of all the parties thereto.

THE JURISDICTION OF A COURT TO ORDER THE ADOPTION OF A MINOR CHILD is necessarily before the court in subsequent proceedings to vacate such order, and the denial of the vacation conclusively affirms such jurisdiction.

DOMICILE.—AN INFANT CANNOT, OF ITS OWN VOLITION, CHANGE ITS DOMICILE.

THE DOMICILE OF EVERY PERSON AT HIS BIRTH IS THE DOMICILE of the person on whom he is then legally dependent, whether it be at the place of the birth or elsewhere.

THE DOMICILE OF ORIGIN IN THE CASE OF LEGITIMATE CHILDREN is the domicile of the father, if living, and if not, that of the mother, and such domicile continues, unless changed by the parent during infancy, until

the infant attains his majority, or perhaps until, after being emancipated by the parents, the infant acquires another.

DOMICILE OF ORIGIN OF A MINOR CONTINUES, notwithstanding the death of his parents, though the child has been taken into another state, unless the domicile was changed by the consent of the parents, or of the last surviving parent.

ADOPTION OF A CHILD LIVING BEYOND THE STATE WITHOUT NOTICE TO, OR CONSENT OF, SUCH CHILD is valid, if the legal domicile of the child is within the state, and its guardian was notified of, and appeared and opposed, the order of adoption, if the statute does not require the child to be personally present in court, or that it shall be notified of the proceedings.

ADOPTION—CONSTITUTIONAL LAW.—A state may authorize its courts, in the exercise of the power and duty of *parens patriæ*, to conduct proceedings for the adoption of minor children, without notice by publication or otherwise to the child, its parents, relatives, or next of kin.

ADOPTION OF MINOR CHILD IN ANOTHER STATE may affect the descent of real property in this state.

ADOPTION OF A MINOR CHILD IS IN THE NATURE OF A PROCEEDING IN REM operative to change the *status* of the child, and, *ipso facto*, to render it what the order of the court declares it to be, the child and heir of the adopting parent, and therefore capable of inheriting from him, in all respects, as if it had been his child, born in lawful wedlock, his property, real and personal, both in the state where the adoption proceedings took place and in every other state in which the *status* or the rights flowing therefrom are not inconsistent with, nor opposed to, its laws and policy.

TAX SALES AND DEEDS.—NOTICE OF AN INTENDED APPLICATION FOR A TAX DEED must, under the statutes of Illinois, be served on the owner of the property personally, if he can by diligent inquiry be found in the county.

A TAX DEED must be based upon an affidavit showing a strict compliance with the conditions upon which it is authorized to be issued, and if the affidavit merely states that the affiant, prior to the expiration of the time for redemption, made diligent search and inquiry, and was unable to find the owner in the county, and made such diligent search and inquiry in that county, this is not equivalent to an affidavit showing that the owner cannot, by diligent inquiry, be found in the county, and the deed based upon such inquiry is void.

BILL in chancery by Mary F. Van Matre for the partition of certain property which she claimed had vested in her and others as heirs at law of Samuel Sankey. The bill showed also that Henry L. Glos claimed some interest in the property under a tax deed, which the complainant alleged to be void. Caroline C. Sankey answered, claiming to be owner in fee and in severalty of the whole of the property, as the heir at law of Samuel Sankey, and by her cross-bill alleged certain adoption proceedings in the court of common pleas of Lycoming county, Pennsylvania, by which she was adopted as the child and heir of Samuel Sankey, and that he had died

intestate, and without any widow and without any child other than herself, and that the estate had descended to her. The trial court found in favor of the defendant Caroline C. Sankey, and also against the tax deed, and dismissed the bill for the partition of the property, and quieted the title of the defendant Caroline against the claimant under the tax deed. At the time of the alleged adoption Caroline C. Sankey was a minor about nine years of age, and her father and mother were both dead. They had resided up to the time of their death in Lycoming county, Pennsylvania. The statute of Pennsylvania on the subject of adoption declared that "it shall be lawful for any person desirous of adopting any child as his or her heir, or as one of his or her heirs, to present his or her petition to such court in the county where he or she may be resident, declaring such desire, and that he or she will perform all the duties of a parent to such child; and such court, if satisfied that the welfare of such child will be promoted by such adoption, may, with the consent of the parents, or surviving parent, of such child, or, if none, of the next friend of such child, or of the guardian or overseer of the poor, or of such charitable institution as shall have supported said child for at least one year, decree that such child shall assume the name of the adopting parent, and be subject to the duties to such child, of which the record of the court shall be sufficient evidence."

F. W. S. Brawley, for the appellant Mary F. Van Matre.

Hamline, Scott, and Lord, for the appellee Caroline C. Sankey.

H. S. Mecartney, for the appellant Glos.

549 SHOPE, J. The question presented by the appeal of Mary F. Van Matre is, whether there was a legal adoption of Caroline C. Sankey by Samuel Sankey, in his lifetime, in Pennsylvania, by which, under the laws of that state, she became his heir at law. It is insisted that there was no legal adoption, for the reason that the court was without jurisdiction to enter the decree: 1. Because said Samuel Sankey was not at the time a resident of the county of Lycoming and state of Pennsylvania, where the same was entered, within the contemplation and meaning of the statute of that state; and 2. That it does not affirmatively appear from the record that said proceedings were had with notice to the child pro-

posed to be adopted. Many minor and collateral objections made may be appropriately considered under these headings.

The question of whether Samuel Sankey was a resident of Lycoming county, Pennsylvania, within the meaning of the statute, was directly presented in the proceedings for adoption, and was determined adversely to the contention of appellant. It will be seen from the foregoing statement that the verified petition presented, alleged that he was a resident of the city and county of San Francisco, California, "and that he is now a temporary resident at Williamsport," in the said county of Lycoming, Pennsylvania. By the recitals in the decree of ⁵⁵⁰ adoption, it appears that the court found he was such temporary resident—that he was "at present resident in said county of Lycoming"—and the court necessarily held that such temporary residence in the county gave it jurisdiction to hear and determine the adoption proceedings.

Again, the same question was raised and determined in the application made by this appellant and other collateral heirs to that court to revoke the order and decree of January 2, 1879. It was there expressly alleged that the court was without jurisdiction, for the reason that said Sankey was a resident of the state of California at the time of the application for adoption. In passing upon that question, that court, in an able opinion by Cummins, presiding judge, said: "The court is asked to set aside this decree of adoption on two grounds: 1. Want of jurisdiction; 2. Misrepresentation of facts. The jurisdiction of the court in this case must appear in the petition presented by Samuel Sankey to the court, asking for the decree of adoption." And after setting out the petition in substance, and its verification, it is further said: "It is as a 'temporary resident' at Williamsport, in the county of Lycoming, that the petitioner invokes the powers of the court of that county Does the word 'resident,' as used in the act of May 4, 1855, *supra*, include a temporary resident?" And after showing that the word "resident" has received various interpretations, it is said: "The purpose of our adoption act is to promote the welfare of the child to be adopted, and any one desirous of adopting a child may invoke the power of the court of the county in which he or she may reside. It does not require that the petitioner shall be a citizen, a freeholder, or an inhabitant, nor does it require that he shall reside any certain length of time. It does not say that he shall

be a permanent resident, which has been held to be synonymous with inhabitant, nor that he may be a temporary resident, which has been held synonymous with a sojourner. After a careful examination of all the authorities cited (they ⁵⁵¹ are too numerous to be classified or referred to here), I am of opinion that the word 'resident,' as used in the act of May 4, 1855, includes both a permanent and a temporary resident, and the jurisdiction of the court is therefore sufficiently set forth in the petition." An appeal having been prosecuted to the supreme court of Pennsylvania, from the judgment rendered by the court of common pleas, that court, after setting out in full, and, in effect, adopting the opinion of the learned judge of the common pleas court, affirmed the order sustaining the demurrer to the petition to revoke the decree of adoption: *Appeal of Wolf* (Penn., April 23, 1888), 13 Atl. Rep. 760.

By the act of May 4, 1855, of the state of Pennsylvania, as will be seen in the foregoing statement, it is provided that if any person is desirous of adopting any child as his or her heir, or as one of his or her heirs, it shall be lawful to present his or her petition to the proper court "in the county where he or she may be a resident," etc. We are now called upon by the same parties who sought to have the decree of adoption set aside in the courts of Pennsylvania, where it was made, and who claim title under and through said Samuel Sankey, to place upon the statute of that state a construction differing materially from that put upon it by those courts, and to hold that Samuel Sankey was not, at the time of the adoption, a resident of Lycoming county, Pennsylvania, within the meaning of said statute, and that, therefore, the court was without jurisdiction to enter the decree. Neither in the petition of the collateral heirs filed in the court of common pleas of Lycoming county, Pennsylvania, nor in the original bill filed in this case, is the allegation of the original petition filed by Samuel Sankey, that he was, at the time of the application for adoption, "a temporary resident at Williamsport," in the county of Lycoming, etc., controverted. It will thus be seen that the question there and here presented was whether a temporary residence was sufficient to authorize the adoption under the statute of Pennsylvania.

⁵⁵² Where a statute of a state has been given construction by the highest tribunal of the state, such construction will ordinarily, in the courts of a sister state, be adopted as bind-

ing and conclusive: *Hunt v. Hunt*, 72 N. Y. 217; 28 Am. Rep. 129; *Gilchrist v. West Virginia Oil etc. Co.*, 21 W. Va. 115; 45 Am. Rep. 555; *Gunn v. Howell*, 35 Ala. 144; 73 Am. Dec. 484; *McDeed v. McDeed*, 67 Ill. 545; *Kingsley v. Kingsley*, 20 Ill. 203. The same rule has been recognized by the supreme court of the United States: *Walker v. State Harbor Commrs.*, 17 Wall. 648; *Bailey v. Magwire*, 22 Wall. 215; *Galpin v. Page*, 18 Wall. 350; *Seacombe v. Railroad Co.*, 23 Wall. 108; *Burgess v. Seligman*, 107 U. S. 20; *Bucher v. Cheshire Co.*, 125 U. S. 555. And this, although the examining court finds that, upon similar language in a statute within their own sovereignty, they would place a different or even reverse construction: *Supra*.

We should here notice the objection that the decree of adoption was entered without the consent of the parties required by the statute. The petition filed by Samuel Sankey alleged that the minor was the child of his brother; that her father and mother were dead; that all the sisters and brothers of her deceased father consented to the adoption, and that her kindred on the mother's side were not so situated or circumstanced that they could properly care for the child. The record discloses that evidence was taken, and it must be presumed that the court found the material allegations of the petition to be true. By the act, as will be seen, the court is required to be satisfied that the interests and welfare of the child will be promoted by the adoption. The guardian, the legality of whose appointment by the court is not questioned, contested the adoption proceedings, and the court, in what must be presumed to be the exercise of its lawful powers, removed him previous to the entry of the decree, and appointed said Samuel Sankey as guardian in his stead. The court had, in the contest made by the former guardian, "after careful investigation and inquiry," found all the facts necessary to justify the decree. It found that the uncles and aunts of the ⁵⁵³ child on its father's side, as next of kin, approved and consented, and that the interests and welfare of the child would be promoted by the adoption, and it was expressly held by the court, on the application of the collateral heirs before mentioned, that "it was not necessary that all of the uncles and aunts should consent." Moreover, as said by that court: "On the day the decree was entered, Huling's appointment as guardian was revoked, and Samuel Sankey, the petitioner in the adoption proceeding, was ap-

pointed guardian of the child, and not only consented, but sought the adoption of his ward."

By reference to the statute set out in the foregoing statement it will be seen that the adoption may be had with the consent of the guardian. While it might have conformed more nearly to the practice in this state, after the appointment of the petitioner as guardian, to have formally appointed a guardian *ad litem* or "a next friend," who, under the statute, could have given the required consent, the failure to do so would, at most, be an irregularity only, which would not subject the decree to collateral attack. At most, it could render the adoption voidable only: *Peak v. Shasted*, 21 Ill. 137; 74 Am. Dec. 83; *Millard v. Marmon*, 116 Ill. 653. This question was necessarily before the Pennsylvania courts, both in the original proceeding and upon the petition to revoke and set aside the decree of adoption, and it was held that sufficient was shown upon the record to warrant the entry of the decree in the common pleas court: *Appeal of Wolf*, Pennsylvania, April 23, 1888. Moreover, the courts of Pennsylvania, in the later proceeding, held, as we think, properly, in considering this and similar contentions, that Samuel Sankey, if living, would be, and the parties now seeking to disregard that decree, claiming under and in privity with him, were, estopped from questioning the validity of the adoption. We do not find it necessary to pursue or determine that matter here. It having been determined, upon direct proceeding, by the court of last resort of the state in which the decree was rendered, that the court of common pleas ⁵⁵⁴ had jurisdiction to enter the decree, we are required to give it full faith and credit. The Pennsylvania court of common pleas having jurisdiction of the persons of the parties and the subject matter, as was necessarily held by the supreme court of that state, had power to adjudicate the questions involved, and its decree cannot be impeached by showing irregularity in its procedure, or that errors intervened in its rendition: *Kinnier v. Kinnier*, 45 N. Y. 542; 6 Am. Rep. 132. Jurisdiction conferred power upon the court to judicially determine the questions involved, and incorporate its determination in a decree fixing the rights of the parties—the *status* of each toward the other; and it will, unless attacked for fraud, be held valid and conclusive upon the parties and their privies until reversed or set aside in the jurisdiction in which it was rendered: 2 Story's Constitutional Limitations, 1313; *Cheever v. Wilson*, 9 Wall. 108; *Nichols v.*

Nichols, 25 N. J. Eq. 63; *People v. Baker*, 76 N. Y. 83; 32 Am. Rep. 274; *Adams v. Adams*, 154 Mass. 295; *Jones v. Warner*, 81 Ill. 348; *Roth v. Roth*, 104 Ill. 35; 44 Am. Rep. 81.

It is contended that the decision of the supreme court of Pennsylvania in *Wolf's Appeal*, Pennsylvania, April 23, 1888, cannot be regarded as an authoritative exposition of the law, for the reason, as it is contended, that no appeal lies from the court of common pleas to that court, and that the appeal of *Wolf*, therefore, conferred no jurisdiction. There is nothing in this record or the adjudications of that court, as we understand them, to warrant the contention. The statutes of that state upon the subject were not proved or introduced in evidence, and in rendering its judgment of affirmance the court necessarily determined its own jurisdiction. It was expressly held in *Appeal of Lewis*, 127 Pa. St. 127, by that court, that upon appeal from a decree of adoption rendered by the court of common pleas, that court could "review the record," and doing so, and finding no error, affirmed the decree. Here, every question presented arose upon the record, and the question determined was whether the matters alleged in the petition for vacation ⁵⁵⁵ were sufficient to require the setting aside of the original decree. It being the court of last resort, it must be presumed, in the absence of any thing appearing to the contrary, that it would not adjudicate unless it had jurisdiction to render judgment in the cause. Its jurisdiction must, therefore, upon this record, be presumed: *Davis v. Packard*, 8 Pet. 323; *Cooley's Constitutional Limitations*, 508; 2 Black on Judgments, 896; *Horton v. Critchfield*, 18 Ill. 133; 65 Am. Dec. 701; *Dunbar v. Hallowell*, 34 Ill. 168; *Osgood v. Blackmore*, 59 Ill. 261.

Nor, in view of this decision of the Pennsylvania court, will it be necessary to determine whether the court of common pleas was exercising a special statutory jurisdiction, and therefore the rules applicable to courts of inferior jurisdiction apply, or not. Sufficient appearing upon the face of the record, as held, the jurisdiction must, in any event, be maintained.

Nor were the proceedings for revocation of that summary character which will not be regarded as *res judicata*, or as conclusive upon the rights of the parties. The application was made by all of the persons interested in the revocation of the decree of adoption, and who are here seeking to avoid it, and against the adopted child. All were before the court. Every

material fact now insisted upon as sufficient to avoid the decree was there presented, and its sufficiency challenged by the demurrer to the petition. The court, upon their petition—every material averment of which was admitted by the demurrer to be true—assumed jurisdiction to determine the question upon the merits, and did so, and, as we have seen, the supreme court of the state, adopting the reasoning of the opinion of the judge of the lower court, affirmed the judgment. The application was properly made to the courts of that state (*Rae v. Hurlbert*, 17 Ill. 572; *Ambler v. Whipple*, 139 Ill. 311; 32 Am. St. Rep. 202), and those courts having assumed jurisdiction to pass upon the merits, it must be presumed that the proceeding was in conformity with the practice in such cases in that jurisdiction.

⁵⁵⁶ It is urged that the court of common pleas of Lycoming county, Pennsylvania, was without jurisdiction, and its decree is void, for the reason: 1. That the child adopted was in Illinois, and out of the jurisdiction of that court; and 2. That it is not shown that there was notice to the child proposed to be adopted. It is said this question was not presented by the petition for revocation of the decree, and was not, therefore, passed upon by the courts therein. Without pausing here to determine this latter contention, it may be again said that the question of the jurisdiction of the court to render the decree was necessarily before the court in the later proceeding, and must have been determined. But if this were otherwise, the contention is without merit. Caroline C. Sankey, at the date of the adoption, was of about the age of nine years. She was born in Lycoming county, Pennsylvania, where her father and mother were domiciled, and which was also the domicile of her parents, severally, at the time of their decease.

There is substantial uniformity of decision that an infant cannot, of its own volition, change its domicile: *Jacobs on Domicile*, secs. 223–229; see cases cited in 5 Am. & Eng. Ency. of Law, 866, note 1. The rule of law is universally recognized, that, every person at birth has his or her domicile in the country or place in which, at the time, the person on whom the infant is legally dependent is then domiciled, whether it be at the place of the birth, or elsewhere. This domicile of origin, which, in case of legitimate children, is the domicile of the father if living, and if not, that of the mother, continues to be the legal domicile of the child, unless changed by the parent during infancy, until he or she, upon attaining

majority, or perhaps after being emancipated by the parents, acquires another. During dependency the legal home or place of domicile follows that of its parents, and it is well settled that if both parents be dead the domicile of the child will be that of its origin, or, if that has been changed by the parents, that of its last surviving parent: Story on Conflict ⁵⁵⁷ of Laws, 46-506; 2 Kent's Commentaries, *227, note b; *Woodworth v. Spring*, 4 Allen, 323; *Lewis v. Castello*, 17 Mo. App. 593; 5 Am. & Eng. Ency. of Law, tit. "Domicile." The infant had, as already seen, been committed by the court of common pleas to the care and custody of a guardian, who was amenable to that court for the discharge of that duty. The guardian was duly notified, appeared, and contested the adoption. The statute of Pennsylvania does not require that the child shall be personally present in court, or that it be notified of the proceeding. Notice to it would in no wise add to, or detract from, the power given, or the duty imposed by law upon, the court of determining the question of adoption in the interest and for the welfare of the child. It could neither consent nor object to the power exercised by the state, through the instrumentality of the court, over its person. The power and duty of the state to care for the estates and persons of infants, so far as necessary for their protection and education, have been generally recognized. It is, in cases of this sort, of the same character of jurisdiction over them that is exercised by courts of chancery, which is an exercise of the prerogative of the sovereign, springing from its power and duty, as *parens patriæ*, to guard the interests of dependents, and protect and control them: 2 Story's Equity Jurisprudence, 1333-1341; *Petition of Ferrier*, 103 Ill. 367; 42 Am. Rep. 10. The precise point arose, upon a similar statute, in *Gibson, Appellant*, 154 Mass. 378. The decree of adoption was made "without notice, by publication or otherwise," to the child, "her parents, relatives, or next of kin." It was held, the statute not requiring it, no notice was necessary, the guardian of the child appearing, and consenting to the adoption. That the child was domiciled in Lycoming county, Pennsylvania, and, for the purposes of adoption, under jurisdiction and control of the court to which the state had committed the performance of its duty, and the exercise of its power in such cases, does not seem to admit of doubt.

⁵⁵⁸ It is insisted that the decree of adoption, although valid in the state of the domicile of the child, and, *pro tempore*, of

the person adopting her, cannot affect the descent of real property in Illinois, and *McCartney v. Osburn*, 118 Ill. 403, is cited as supporting that contention. This is a misapprehension of the cases cited, as well as of the effect of the decree of adoption. In the *Osburn* case the courts of Pennsylvania had given construction to clauses of a will as affecting property situated in that state, and the question was, whether the parties were estopped, by the construction there given, in proceedings in this state affecting real property in this state. It was held that they were not, and that the courts of each state must construe the will, as affecting lands within their respective jurisdictions, for themselves, and might do so as if the several properties were devised by separate wills. The real property passed under the law of its *situs*, and not by the law of the domicile of the testator, and therefore the will must be construed under the laws of this state, and that construction controls its disposition. That case was expressly distinguished from *Hanna v. Read*, 102 Ill. 596, 40 Am. Rep. 608, and like cases, in which it is held that the right to relitigate is concluded by the former adjudication.

The proceeding in this case was in the nature of a proceeding *in rem*, the purpose being to change the *status* of the child in her relation to said Samuel Sankey. The decree of adoption was a declaration by competent authority, operative to change her *status*, and, *ipso facto*, to render her that which she was declared to be—the heir at law of Samuel Sankey—and capable of inheriting from him, in all respects, as if she had been his child born in lawful wedlock: 2 Black on Judgments, 792 et seq. The statute under which the adoption proceedings were had provides that the child shall be decreed to take the name of the adopting parents, “and have all the rights of a child and heir of such adopting parents, and be subject to the duties of such child.” The decree, by force of this statute, ⁵⁵⁹ established, *eo instanti* its rendition, the relation of parent and child, imposed upon the parties the reciprocal duties and obligations of that relation, and impressed upon and invested the child with the rights and qualities of a child and heir at law of Samuel Sankey. This we understand to be the construction of the statute by the courts of that state: *Wolf’s Appeal*, Penn., April 23, 1888. The *status* of appellee having been established under, and existing by, virtue of the *lex domicilii*, is to be recognized and upheld in every other state, unless such *status*, or the rights flowing

therefrom, are inconsistent with, or opposed to, the laws and policy of the state where it is sought to be availed of.

This court, in *Keegan v. Geraghty*, 101 Ill. 26, quoted with approval the language of Mr. Justice Gray in *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321, as follows: "It is a general principle that the *status* or condition of a person, the relation in which he stands to another person, and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicile, and this *status* and capacity are to be recognized and upheld in every other state, so far as they are not inconsistent with its own laws and policy," and the principle announced, with its limitation, was expressly approved: *Roth v. Roth*, 104 Ill. 35; 44 Am. Rep. 81, and cases cited. In *Keegan v. Geraghty*, 101 Ill. 26, the child, adopted under the laws of Wisconsin, sought in this state to take, not from the adopting parent, but from collaterals and by representation. This court expressly recognized the *status* established in Wisconsin, so far as it related to the right to inherit from the parent by adoption, because consistent with the laws of this state relating to descent to adopted children, but denied the right to take by representation from collateral kindred of the parent, for the reason that such taking was prohibited by, and inconsistent with, the laws of this state: Rev. Stats., c. 39, sec. 1, par. 5. No inconsistency with our laws or their policy exists in this case. The rights claimed under and by virtue of the adoption in Pennsylvania ⁵⁶⁰ are those, and none other, that would exist upon the creation of the same artificial relation in this state.

We are of opinion, therefore, that, upon the death of Samuel Sankey without other children, the estate in Illinois descended to appellee, Caroline C. Sankey, as his child and heir at law, and that the court correctly decreed in dismissing the original bill.

It remains to consider the errors assigned by appellant Glos. He claimed title, as alleged and admitted, under four several tax deeds to lots 58 and 59, in Mather and Taft's addition, etc., being parcel of the property in controversy. The cross-bill, as amended, alleged the invalidity of these deeds, and set out various defects in the proceedings preceding their issue, and prayed that they be severally removed as clouds, etc. To sustain these allegations the cross-complainant, among other things, introduced in evidence the affidavits made under section 217 of the revenue act by the purchaser,

or his assignee, as compliance with the requirements and conditions prescribed by section 216 of that act, in respect of each of said tax deeds. These several affidavits, in the respect here considered, are the same, and the objection is common to all.

By section 216 the purchaser, or his assignee, is required, among other things, as a condition precedent to his right to a deed, to serve the notice therein prescribed "on the owner of, or parties interested in, said land or lot, if they can, upon diligent inquiry, be found in the county." And it is further provided that "if . . . the owners cannot be found in the county," then such purchaser, or his assignee, shall publish such notice in some newspaper, etc. It is clear that personal service of the notice upon the owner, etc., is required when, by diligent inquiry, he or she can be found in the county, and resort to publication of the notice can avail or be held to be sufficient to entitle the purchaser or assignee to a deed, or to authorize the clerk to execute the same, only when the owner cannot, upon such inquiry, be there found. This provision ⁵⁶¹ requiring personal service, if to be found in the county, was, as said in *Wilson v. McKenna*, 52 Ill. 43, "intended for wise purposes—to prevent owners of land from being deprived of their titles except upon actual notice, if practicable to give it." And it is only when the presumption that the owner is an absentee from the county is raised by a failure to find him after diligent inquiry, that constructive notice by publication is authorized.

By the next section of the statute (217) the purchaser or assignee, by himself or agent, is required to make and file with the proper officer authorized to execute the deed an affidavit of compliance with the conditions of section 216, stating particularly the facts relied on as such compliance. It is upon this affidavit the clerk acts. If it shows strict compliance with the statute his act in executing the deed will be lawful; if it does not, it will be unauthorized, and the deed void: *Wilson v. McKenna*, 52 Ill. 43; *Wisner v. Chamberlin*, 117 Ill. 568; *Stillwell v. Brammell*, 124 Ill. 338. So much of these affidavits as is important here is as follows: That "during the two months next preceding the last three months prior to the expiration of the time of redemption from said sale, affiant made diligent search and inquiry in said county for said S. Sankey" (the person in whose name assessed), "and, upon such diligent search and inquiry, was unable to find him

in said county," and that affiant "made diligent search and inquiry in said county for the owners of said premises, and, upon such diligent search and inquiry, was unable to find any of said owners, and, upon such diligent search and inquiry, affiant was unable to find the names of any of said owners, except," etc., naming six persons. There is no other statement in the affidavit that aids the part quoted. We are of opinion that the affidavit failed to show compliance with the letter or spirit of the statute. The proceeding resulting in the execution of the tax deed is *stricti juris*, and no intendments in aid of it can be indulged. The act is silent as to ⁵⁶² where the "diligent inquiry" shall be made, but it must be of such character that it will enable the party to swear that, upon diligent inquiry, the owner "cannot be found in the county." The statement that the affiant made diligent inquiry "in the county," and, upon such diligent inquiry, the owner cannot be found, may be, and is, very different from the statement that, upon diligent inquiry, the owner cannot be found in the county. The first statement may be true, and still, by resorting to those means within the power of the party, and which an ordinarily diligent person would resort to, the place where the owner could be found in the county might be readily known. "Diligent inquiry," as used in the statute, means such inquiry as a diligent man, intent upon ascertaining a fact, would usually and ordinarily make—inquiry with diligence and in good faith to ascertain the truth. Undoubtedly, inquiry in the county is proper, and ordinarily, perhaps, if sufficiently extended in good faith, all that would be required to constitute "diligent inquiry." It is apparent that this affidavit may be entirely true—i. e., that, upon diligent inquiry "in the county," the owners could not be found—and yet the purchaser, or his assignee, or his agent, making the affidavit, have known that without expense, inconvenience, or delay he could readily ascertain the place "in the county" where the owner could be found, by inquiry just across the county line, or in some locality easy of access. Prudent and diligent men, who in good faith are seeking to find, pursue those lines of inquiry open to them which may lead to the ascertainment of the fact, and exercise at least ordinary diligence therein, and for aught that is shown, if the person making this affidavit had, with ordinary diligence, pursued inquiry where the fact might have been found he would have found the owners in the county. As

before said, the statute does not prescribe that diligent inquiry in the county will suffice, but requires that the inquiry shall be diligent, so that, *prima facie*, at least, the party sought cannot be found in the county, so that the party making the ~~563~~ proof can state that, upon diligent inquiry, he cannot be found in the county.

Other objections are made to the tax deeds, some applying to all, and others to the deeds severally, which we do not deem it necessary to discuss. The objection already examined, which we regard as fatal to their validity, applies to all of them, and was sufficient to authorize the decree setting them aside on the terms imposed.

Finding no error in this record requiring a reversal, the decree of the circuit court is affirmed.

Decree affirmed

TAX TITLES.—A title to be made under a tax deed is one *stricti juris*, and a strict compliance with the law must be shown: *Stillwell v. Brammell*, 124 Ill. 338; *Brown v. Wright*, 17 Vt. 97; 42 Am. Dec. 481, and note; *Terry v. Bleight*, 3 T. B. Mon. 270; 16 Am. Dec. 101, and note; *Scales v. Alvis*, 12 Ala. 617; 46 Am. Dec. 269, and note; *Dikeman v. Parrish*, 6 Pa. St. 210; 47 Am. Dec. 455, and note; *De Witt v. Hays*, 2 Cal. 463; 56 Am. Dec. 352; *Bowen v. Swander*, 121 Ind. 164, and the note to *Bidwell v. Webb*, 88 Am. Dec. 59.

Adoption by One Person of the Children of Another.

Origin of Law of.—The adoption of the children of another person, while recognized by the civil, is said to have been unknown to the common law: *In re Johnson*, 98 Cal. 531; *Morrison v. Sessions*, 70 Mich. 297; 14 Am. St. Rep. 500. It was naturally introduced into the laws of those portions of our country which had been French or Spanish colonies, but probably was not a part of the statutory law of any other portion of the United States until a comparatively recent period: *Bouvier's Law Dictionary*, ed. 1867. Whether this be true or not, statutes upon this subject have now been enacted in all of the states of this union, unless it be Maryland, South Carolina, Virginia, West Virginia, and Montana: *Stimson's American Statute Law*, secs. 6640–6651. No general statement of these statutes will be attempted here. It is sufficient for our present purpose to state that they generally permit the adoption to be made by any adult resident of the state with the consent, if married, of his or her husband or wife. They usually require the person adopted to be a minor child, and sometimes prescribe that there shall be a specified difference between the ages of the parent adopting and the child adopted. The consent of the child is exacted if it is of the age of consent designated in the statute, and the consent of the parents or surviving parent is generally indispensable, unless he or she has forfeited his or her rights either by abandoning the child, or by being guilty of such misconduct that a court of competent jurisdiction has in some divorce or other proceeding awarded the custody of the child, either to the innocent parent or to some other person or persons, and the parent whose consent is not required has thus ceased to

have any parental right or authority over the child. The consent of the parent is usually evidenced by a writing executed with certain formalities prescribed in the statute, while that of the child, when necessary, is more commonly ascertained by its examination either in open court or before some public officer, and, in some of the states both the parents and the child must appear in court and there manifest their consent, if the child is of the age of consent. In a majority of the states the proceeding for adoption is judicial in its character, and takes place either in open court, or before a judicial officer, who is required to institute some inquiry for the purpose of determining whether the proposed adoption is for the best interest of the child, and to state in a judgment or order of adoption that he finds that the interests of the child will be promoted by it. In many of the states the authority of the judge or court is invoked by petition, while in others the consent of the natural parent, or parents, and the agreement of the adopting person, are of themselves sufficient to call into being the jurisdiction of the court or judge. The effect of the adoption is, under these statutes, to put the child and the adopting parent in the relation of parent and child with all its legal consequences, and, on the other hand, to divest the natural parent or parents of the child for most purposes of the relation they have hitherto sustained towards it, and to discharge it from all further obligation or duty to them: Stimson's American Statute Law, secs. 6640-6651.

The Nature of the Proceeding For Adoption is not necessarily judicial. "Adoption has been defined to be the act by which relations of paternity and affiliation are recognized as legally existing between persons not so related by nature": *Morrison v. Sessions*, 70 Mich. 297; 14 Am. St. Rep. 500. This act may doubtless be authorized to take place without the intervention or act of any court or judicial officer, or such officer may be required to attest it or to take the acknowledgment of the parties to some instrument evidencing it, and, when so doing, his act is no more judicial than is the act of a notary in taking and certifying to the acknowledgment of a conveyance. Though the judicial officer is required to exercise some judgment or discretion, his act has been held not to be judicial. Thus, where it was contended that the statute relating to adoption was unconstitutional, because it vested the authority in the county judge, whereas the constitution of the state vested all judicial power in certain courts, the contention was overruled, and the views of the appellate court thus expressed: "It is said that the adoption of the child was a judicial act, and therefore must be done by a court, and cannot by the constitution be done by a judge, as was the case here. The adoption of children is purely a matter of statute, pertaining to the legislature, with which a court or judge has nothing to do, unless the power is conferred upon them by statute. The matter of adoption belongs to the legislative, and not to the judicial, department of the government. We know of no rule of law which ever enabled any person or tribunal, whether notary public, clerk of a court, judge, or court, to perform the ceremony of adopting a child, unless such authority was conferred by a legislature. As the legislature has full power over this matter, it may invest any person or officer or court with the power of receiving, witnessing, and declaring the adoption. It may prescribe what that ceremony shall be, and before whom it is to be celebrated. It may make the ceremony so simple that its celebration only requires the consent in writing of the parents of the child, and the acceptance of such consent by the person desiring to adopt and filing such paper with a public officer": *Estate of*

Stevens, 83 Cal. 322; 17 Am. St. Rep. 252; *Estate of Williams*, 102 Cal. 70. Whenever, however, the adoption is required to take place in a court, and to be preceded by a petition, or to be accompanied by certain agreements or consents, and an examination is required to be made by such court for the purpose of ascertaining whether the interests of the child will be promoted by the adoption, and whether the circumstances disclosed by the petition or otherwise establish the right of the petitioner to make the adoption, and the consent, where necessary, of the natural parent to the substitution of the adopting parent in his place, we apprehend that the action of the tribunal must be regarded as judicial, and therefore as conclusive, if it has jurisdiction of the parties and the subject matter, until set aside by appeal or by some other direct proceeding.

The Constitutionality of Adoption Statutes has been assailed on the ground that they might authorize the depriving of a natural parent of his or her rights without notice or due process of law, and on the ground that they deprived heirs of their right of inheritance. The first ground of assault has not received attentive consideration, for the reason that it has never been made by a parent claiming the right to the custody or services of his child, but has been interposed by other persons who merely sought to assert the existence of some right in favor of the natural parent, in order to obtain an advantage for themselves. So far as the decisions have spoken on this subject, they indicate that a parent has no vested right in his or her child, and that the legislature may interpose between the parent and child such regulations as it may deem best for the welfare of either, and that because of its duty "as *parens patriæ* to guard the interests of dependents and protect and control them," it may authorize a decree of adoption to be made without any notice either to the infant or to its parents, guardian, or next of kin: *Van Matre v. Sankey*, 148 Ill. 557; *ante*, p. 196; *Gibson, Appellant*, 154 Mass. 378; *Estate of Williams*, 102 Cal. 70; 41 Am. St. Rep. Said Clark, judge, in *Nugent v. Powell*, Wyo., May, 1893: "That in American jurisprudence the right of the father to the custody of his child is not an absolute right, but that it is in all cases referable and subordinate to the interests and welfare of the child," and he therefore held that though a statute might be construed as entitling a court to proceed to authorize an adoption of a minor child without notice to a parent, who was alleged to have abandoned it, yet the statute could not for that reason be adjudged unconstitutional. There is still less merit in the claim that adoption statutes may be unconstitutional because they deprive those who otherwise would be heirs of the adopting parent of their rights of inheritance. Until an estate has actually become vested by inheritance, an heir can have no vested interest in it whatever, and therefore, neither a statute of adoption nor any other statute whose "incidental effects change the descent or devolution of property" is invalid, unless it defeats vested rights: *Sewall v. Roberts*, 115 Mass. 262.

Another objection has been made against adoption statutes which may be regarded as questioning their constitutionality, when an effect is claimed to them of a retroactive character. For instance, the statute may authorize the adoption for certain causes, or may justify the action of the court, without giving any notice to a parent, or in disregard of his wishes, when it appears that he has been divorced, because of his adultery, or other misconduct, and the statute is sought to be applied in support of an adoption made after its enactment, but the parent's consent is dispensed with, because of some wrongful act of his antedating the statute, and which, when committed,

did not include in its consequences the adoption of his child by another, without the parent's consent. The statute is not, however, regarded as imposing a punishment upon such parent, nor as depriving him of any vested right, but merely as promoting the welfare of his child, by not leaving its interests under the control of a parent whose unfitness for such control the legislature assumes to be a provable consequence of his misconduct. The statute is, therefore, applicable retroactively to sustain the subsequent adoption of all minors under the conditions prescribed in the statute, though some or all of the conditions existed anterior to the statute, and did not then authorize any adoption whatever, or any adoption without first securing the consent of the natural parent or parents: *Estate of Williams*, 102 Cal. 70; 41 Am. St. Rep.

As to the Persons Who May Adopt a Child, the only decisions coming within our observation relate merely to the question of residence, and of the joinder of two or more persons in a single adoption. The statutes, generally, though not universally, require the adopting person to be an inhabitant or resident of the state, and, in some instances, this requirement, though not directly expressed in the statute, has been held to be implied. Thus, in a proceeding in Massachusetts for the partition of real property in which one of the claimants asserted title by virtue of adoption proceedings conducted in New Hampshire, it appeared that the statute of the latter state authorized the adoption of a child on petition to the probate court in the county where the petitioner or the child resides, and that the adopting parent in the case before the court was not a resident of the state of New Hampshire when the petition was filed or the order for the adoption made. The adoption was declared void, because "such a statute is not to be presumed to extend to a case in which the domicile of those petitioning for leave to adopt a child is in another state; the provision in the statute of New Hampshire, that the decree may be made in the county where the petitioner or the child resides, implies that the statute is intended to be limited to cases in which all the parties have their domicile in that state, and there is no presumption in favor of the jurisdiction of the probate court exercising a special authority conferred by statute, and not according to the usual course of proceedings at common law or in chancery": *Foster v. Waterman*, 124 Mass. 592.

Joint Adoptions.—In several cases adoption proceedings have been questioned, because they purported to be joint and to authorize the adoption both by a husband and his wife, so that the person adopted, instead of becoming the child of one of the spouses only, became the child of both. While the statutes often require the consent of one spouse to the adoption of a child by another, it is somewhat remarkable that none of them in direct terms purport to authorize the joint adoption by a husband and wife. In no case has an adoption been declared invalid because purporting to be the joint act of two spouses. Such adoption may be defended either upon the ground that the joinder of the wife therein is a mere superfluity, in no way affecting the validity of the adoption, as against the husband and his successors in interest (*Abney v. De Loach*, 84 Ala. 393), or, in those states in which there is no incapacity on the part of the wife to adopt a child with the consent of her husband, the adoption may be treated as the joint act of both, and as rendering the person adopted the child of both, as if born to them in wedlock. Hence, the courts of Indiana and California have both indicated that under their statutes an adoption may be by both spouses as well as by one. The statute of Indiana authorizes the adoption of a minor child by any person. In a case in which the adoption appeared to be the joint act of

both husband and wife, it was objected that such adoption was void, but the court declared that "the obvious purpose of the statute before us was to authorize the incorporation of the children of other persons into families desirous of assuming control over them, and in that way to sanction the formation of new and artificial family relations between persons not necessarily of the same blood"; and after stating the objections made by way of argument to a joint adoption, the court answered them, saying: "On the contrary, the better and more reasonable construction appears to us to be that a wife may unite with her husband in such a proceeding, as, from the very nature of things, the interests of the entire family are necessarily involved in the object sought to be accomplished by it. There is not only no inconsistency, but a manifest propriety, in the wife thus uniting with her husband, as by doing so the adopted child is made to assume, in a general sense, the same position in the family which it would occupy if it were the natural child of both born in lawful wedlock": *Krug v. Davis*, 87 Ind. 590; *Markover v. Krauss*, 132 Ind. 294. When the same question arose in California, under a statute somewhat similar to that of Indiana, the court said: "Under these provisions a wife has precisely the same right to adopt a child as the husband, and we know of no reason why both should not unite in an application for the adoption of a child as the child of both, or why, in such a case, the order of adoption should not declare that the child shall henceforth be treated and regarded as the child of both spouses. On the contrary, such procedure would seem to be in entire harmony with the object of the law, and the appropriate way by which husband and wife may mutually consent to the adoption of a stranger in blood into the family, and to assume towards such child the duties of the parental relation": *Estate of Williams*, 102 Cal. 70; 41 Am. St. Rep.

The Person to be Adopted is usually designated in the statutes as a minor child, and even in the absence of any designation of the age of the person to be adopted, the statute has in one state been construed as applying to minors only (*In re Moore*, 14 R. I. 38), while in another it has been said that the authority to adopt a child was not necessarily restricted to minor children: *Markover v. Krauss*, 132 Ind. 294. Whether a statute in terms excludes children who are not residents of the state or not, it must necessarily be confined to children actually or constructively within the state, for it is not possible for any state to authorize its courts to take jurisdiction over persons who are not within its limits nor otherwise subject to its laws. The child whose adoption was questioned in the principal case was not within the state when adopted, but her domicile was there because there she had been born, and no person having authority to do so had changed her domicile. She was, therefore, so within the jurisdiction of the state and its courts that an adoption proceeding could be conducted, of the benefit of which she was entitled to avail herself, and which neither the adopting parent, nor his personal representative after his death, could successfully assail. If the child adopted is not within the jurisdiction of the state where the adoption takes place, either actually or constructively, there can be no doubt that such adoption could not as against the child, or its parents, not participating therein be regarded as imposing upon it any duty to the adopting parent, or as depriving the natural parents of any of the rights, or releasing them from any of the obligations, of such parentage. As to the adopting parent, the rule may possibly be otherwise if the adopting child, as a matter of fact, takes its place in, and as a part of, his family, and thereafter occupies toward him the relation, and submits itself to the obligations,

of a child towards its parent. In such a case it may be that an adopting parent and his personal representative after his death will be estopped from assailing the validity of the adoption by questioning the jurisdiction which he invoked, and to which he submitted so far as it was possible for him to do.

The Validity of Adoptions, When Questioned in Collateral Proceedings, depends very much upon the views of the court before which the question is presented respecting the character of the proceeding and of the statutes by which it is authorized. Of course, if the proceedings were conducted in strict compliance with the statute, and this appears to the court by such evidence as it deems competent and satisfactory, there can be no question except as to the constitutionality of the statute, and no statute authorizing adoptions has, up to the present time, been held unconstitutional in any respect. But more frequently than otherwise there has been some omission or irregularity in the proceedings, or, at least, the existence of a strict, or even a substantial, compliance with the statute does not appear from the written evidence of the adoption proceedings themselves, and then these questions arise: 1. Can the proceedings be supported by extrinsic evidence? and 2. Does the omission, or irregularity, supposing it still to appear notwithstanding such evidence, render the proceedings void? There have, undoubtedly, in connection with the question of adoption, been some absurd judicial utterances, by way of application of the absurd rule, that statutes in derogation of the common law should be strictly construed, and this notwithstanding the fact that the code, of which the adoption law under consideration was a part, expressly declared that "the rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code," and that the provisions of such code were to be "liberally construed, with a view to effect its objects and to promote justice": Cal. Civ. Code, sec. 4. Thus, in the state from whose code the foregoing quotation was made, it has been said: "A child by adoption cannot inherit from the adopting parent, unless the act of adoption has been done in strict accordance with the statute. No matter how persuasive may be the equities of the child's case, or how clear the intention of all parties, it must appear that the statutory conditions have been strictly performed, otherwise the relation never existed, and the right to inherit never was acquired. The right of adoption is purely statutory. It was unknown to the common law, and as the right, when acquired under our statute, operates as a permanent transfer of the natural rights of the parent, it is repugnant to the principles of the common law, and one who claims that such a change has occurred must show that every requirement of the statute has been strictly complied with. It cannot be said that one condition is more important than another": *Ex parte Clark*, 87 Cal. 641. Adoption proceedings are generally conducted by, or before, courts or judicial officers of special or limited jurisdiction. There has, in some instances, therefore, been applied to adoption proceedings taking place in such court the rule that nothing is presumed in favor of the jurisdiction of such courts or tribunals, and in one instance, at least, it has been said that the jurisdiction must appear by the record, though it would, perhaps, puzzle the judge making such declaration to explain how any matter can appear by the record of a court or tribunal which is not authorized to have, and is therefore incapable of keeping, any record whatsoever. We again quote from the opinion in the case last cited: "It has been held—and, we think, correctly—that in cases of this kind the power of the court being special, and not exercised according to the course of the common law, its decisions must be regarded

and treated like those of courts of limited and special jurisdiction; and that the jurisdiction in such cases, although the court be one of general jurisdiction, must appear by the record as to both subject matter and the person." Many other decisions might be cited in which the language employed by the court is in apparent hostility to the right of adoption, and from which, disconnected from the circumstances in which the language was used, the inference might reasonably be drawn that adoption was not only a common enemy to be resisted wherever it should appear, but, further, that it was not entitled to the amenities of warfare as practiced among civilized nations: *Furgeson v. Jones*, 17 Or. 204; 11 Am. St. Rep. 808; *Tyler v. Reynolds*, 53 Iowa, 146; *Shearer v. Weaver*, 56 Iowa, 578. With the decisions themselves, in which such language was used, little or no fault can be found. The objections there sustained were substantial, though, perhaps, they ought not to have been considered, because they were interposed by persons equitably estopped from urging them.

As to the notion that the existence of all acts necessary to sustain an adoption should appear by the record, nothing can be more absurd. In the first place, when a court has attained the dignity of a court of record, its jurisdiction and the rightfulness of its action are presumed, and, when it has not attained such dignity, it has no record by which it can speak; and, in the second place, the rule respecting judicial officers, and courts of limited jurisdiction and authority, is that, except when required to make and preserve some written evidence of their jurisdiction, it may be established by extrinsic evidence, whether oral or written: *Jolly v. Foltz*, 34 Cal. 321; *Reclamation District v. Goldman*, 65 Cal. 638; *Williams v. Cammack*, 27 Miss. 209; 61 Am. Dec. 515; *Barnard v. Barnard*, 119 Ill. 98; *Van Dusen v. Swett*, 51 N. Y. 378. Hence, in the most recent decision upon the subject, the case of *Ex parte Clark*, 87 Cal. 641, hereinbefore cited, has been explained and modified, and the rule announced that, to sustain an adoption, oral evidence may properly be received of supporting facts not disclosed from the record or writings evidencing the adoption: *Estate of Williams*, 102 Cal. 70; 41 Am. St. Rep.

If there are any statutes in favor of which liberal presumptions and intendiments should be indulged to support proceedings taken in good faith thereunder, the statutes authorizing the adoption of minors should be included among them. The policy of these statutes is one against which nothing can be urged. By virtue of them, children usually helpless, and actually or substantially parentless, are given the advantage of home and parentage, and thereby the best interest of the state, as well as of the parent adopting, and the person adopted, are secured, and it is almost inconceivable that a strict construction of these statutes should have been applied in any case for the purpose of thwarting the will of the adopting parent, and disinheriting adopted children in favor of the kindred by blood, whom the adopting parent had sought to exclude from participation in his estate by the adoption of a child of another person. This hostility is gradually disappearing; perhaps it has already disappeared. Hence we find the court, in *Cofer v. Scroggins*, 98 Ala. 342, ante, p. 52, declaring, that "a liberal operation and intendiment should be given to the statute." In another case it was said that, "whether a proper construction of such legislation should be strict or liberal, it must certainly be reasonable, and fairly give effect to its intent": *Fosburg v. Rogers*, 114 Mo. 134. So it was said in the recent case of *Nugent v. Powell*, May, 1893, in the supreme court of Wyoming: "We now come to the main question in the case, viz., Were the adoption proceedings had in con-

formity with the provisions of our statute? The determination of this question demands examination of the statute, and also of the general principles of the law relating to the rights and duties of parents and children. It must be admitted in the beginning that a proceeding in adoption was wholly unknown to the common law, and in our system of jurisprudence it is purely a statutory matter. Hence it follows that in order to give any validity to such proceedings, they must have been conducted in substantial conformity with the provisions of the statute, and its requirements observed; but, notwithstanding this, it ought not to be overlooked, in the examination of cases growing out of the exercise of this statutory right, that the right is a beneficial one, both to the public and to those immediately concerned in its exercise. Since its incorporation into our system (and the fact is such statutes have been adopted in nearly every one of our states) the homes of many childless parents have been brightened and made happier because the law enabled them to bring into that home a child upon whom their affections could center and develop. Many an orphan child, and many a child whose parents were unable, by misfortune or their own infirmities, to care for, have, by means of this statutory right, found good homes, loving and affectionate parents, and thereby grown up to be good and valuable members of society, when otherwise they would have spent their early years in ignorance and vice, and in such surroundings grown up to young manhood or young womanhood simply to swell the overflowing ranks of the vicious and criminal classes of society; and hence it seems to me that in cases of this kind it is not the duty of the court to bring the judicial microscope to bear upon the case, in order that every slight defect might be enlarged and magnified, so that a reason might be found for declaring invalid an act consummated years before, but rather approach the case with the inclination to uphold such acts, if it is found that there was a substantial compliance with the statute."

Where there is a completed attempt to adopt a child, and it clearly appears that the consent had been given of all persons whose consent is necessary, and the child has been received in, and made a part of, the family of the adopting parent or parents, the provisions of the statute respecting the mode in which proceedings for adoption should be conducted are directory merely: *In re Johnson*, 98 Cal. 531. Hence the adoption will not be disregarded as void in collateral proceedings because the papers were signed before they were presented to the judge instead of at the time he made his order: *In re Johnson*, 98 Cal. 531; or the name of the adopted child did not appear in the body of the instrument of adoption or in the order of the court, if its identity is otherwise clearly manifested: *Bancroft v. Bancroft*, 53 Vt. 9; *Fosburg v. Rogers*, 114 Mo. 122; or that the judge did not examine the child personally, it being under the age of consent: *In re Johnson*, 98 Cal. 531; or the record of adoption is found in the book of wills and deeds instead of in the minutes of the probate court, and fails to state the age of the child: *Abney v. De Loach*, 84 Ala. 393; or the order is made in open court instead of at chambers, if it is in fact signed by the judge and filed in the adoption proceedings, though it recites that it was made by the court, and it is the judge, and not the court, that was authorized to act in the matter of adoptions: *Estate of Newman*, 75 Cal. 213; 7 Am. St. Rep. 146; or the consent of the judge was entered on a detached piece of paper, there being no statute prescribing the manner in which his records should be kept, and no evidence that he kept them in any other way: *Nugent v. Powell*, Wyo., May, 1893, or the judge fails to witness the signature of the adopting parents

by subscribing his name thereunder, he having, however, declared in his order that the parties appeared before him and signed the necessary consent: *People v. Bloedel*, 16 N. Y. Supp. 837; or a guardian *ad litem* was not appointed to represent the interests of the child: *Van Matre v. Sankey*, 148 Ill. 536; *ante*, p. 196; *Sewall v. Roberts*, 115 Mass. 262.

Collateral Attacks.—If the proceeding for the adoption is judicial, and the officer or tribunal is acting as a court or judge, then, upon principle, the order of adoption partakes of the characteristics of a judgment, and if there is jurisdiction over the parties and the subject matter, it cannot be avoided for errors or irregularities, except upon appeal or by motion to vacate it, and is therefore exempt from collateral attack. Thus, where it was claimed that an order of adoption was a nullity, because it was not shown that the county in which the petition was presented was the residence of the petitioner, nor that the father of the child was dead, or, if living, that he consented to the adoption, the court said: "It is not important here to inquire—this record coming before this court collaterally—whether the county court erred, simply, in decreeing as it did. The question is, did it have jurisdiction to make any decree in the matter. If it had jurisdiction to decree in the case, the decree, until reversed, however erroneous merely, must stand. It will be observed that the statute clearly gives the court the power to decree as to the subject matter, and the only question, therefore, is whether the parties required by the statute to be before the court in order that such a decree be rendered were in fact before the court. The presumption in the first instance is, that the court had jurisdiction, unless it is apparent from the act itself that the court could not have had jurisdiction in any contingency, or unless the statute empowering the court to act requires the act to affirmatively show precedent to its decree some fact which it fails to show. There being no pretense of any thing here showing affirmatively that Walter Barnard did not at the time of presenting the petition reside in McLean county, or that the complainant had a father alive who had not abandoned him at the time, it only remains to examine whether the petition affirmatively recites all the jurisdictional facts which the statute specifies shall be recited in it, for we have held no more need be recited": *Barnard v. Barnard*, 119 Ill. 92, 98. From the preceding quotation it appears that, at least, in Illinois the jurisdiction of the court will be presumed. On the other hand, it has been held that if it appears that the minor had a father who was a nonresident of the state, and the record is silent as to any notice to, or appearance by, him, the jurisdiction of the court over him will not be presumed: *Furgeson v. Jones*, 17 Or. 204; 11 Am. St. Rep. 808. This decision may, perhaps, be sustained on the general principle that a person outside of the state is not within the jurisdiction of its courts, and cannot, except by his voluntary action, be required to subject himself or any of his rights to its jurisdiction, and that the judgment or order in question necessarily proved that there was no jurisdiction over him. We have already referred to the statement in *Ex parte Clark*, 87 Cal. 638, that the jurisdiction of the court must appear by the record, but it was subsequently shown that what the court meant was, that in the proceeding before it involving the adoption there should have been some proof that the judge had jurisdiction, and it is clear that nothing respecting the jurisdiction need be disclosed on the face of the record or other proceeding supporting the adoption, except what the statute requires to be so disclosed, and that as to other facts, if it be necessary to prove them in support of the

adoption, they may be established by extrinsic evidence: *Estate of Williams*, 102 Cal. 70; 41 Am. St. Rep.; *Barnard v. Barnard*, 119 Ill. 92.

Estoppel.—If a person resorts to a court for the purpose of obtaining, and does there obtain, a decree or judgment, though it is void as against his adversary, yet if the latter accepts and acts upon it, he at whose instance it is obtained is estopped from asserting its invalidity for the purpose of seeking some advantage to himself, or of subjecting the innocent party to some loss or punishment. This rule has been applied against a person procuring a void decree of divorce, and then proceeding against the other spouse who contracted a second marriage in reliance upon this decree: *Palmer v. Palmer*, 1 Swab. & T. 551. This principle we conceive to be applicable to proceedings for adoption. If the adopting parent conducts such proceedings, and procures an order or agreement of adoption, and takes the child into his family, where it assumes the place and duties of his child, we think the courts will not permit him to subsequently urge that his proceedings were void. Nor, indeed, up to the present time has any adopting parent ever undertaken to do so, but in several cases, after his death, persons connected with him by ties of consanguinity have tried to claim his estate and incidentally to assert that the order of adoption procured and respected by him was void. Success has followed in some instances, attended with the assertion that the order could not bind any one: *Furgeson v. Jones*, 17 Or. 204; 11 Am. St. Rep. 808. Chief Justice Beatty, in *In re Johnson*, 98 Cal. 543, while insisting that as against the child the proceedings required for an adoption should be strictly pursued and construed, added: "But it does not lie in the mouth of a stranger or of one claiming through an adult and the consenting party to the adoption proceeding to say that because the interest of the passive and helpless subject of it were not so carefully looked after as they should have been she must therefore be deprived of the advantage of the order of adoption to which she has always conformed, and the protection of which she invokes." This principle was recognized and approved in the states of Pennsylvania and Illinois in the various attempts there made to collaterally avoid the proceedings for the adoption of Carrie Sankey: *Appeal of Wolf*, 13 Atl. Rep. 760; *Van Matre v. Sankey*, 148 Ill. 553; *ante*, p. 196. In a still more recent case, and in an opinion meeting, as we understand, the concurrence of the entire court, it was said: "The decedent voluntarily entered into the contract of adoption under consideration here, and received in his lifetime the benefits resulting from the relation thus created—the society, affection, and devotion of an adopted daughter—and no principle of law or equity will permit the appellants claiming under him to avail themselves of this technical departure from the direction of the statute to defeat the rights of the respondent growing out of the contract, the validity of which was never disputed by the decedent, and which has been fully performed by all the parties to it": *Estate of Williams*, 102 Cal. 70; 41 Am. St. Rep.

To the rule that the adopting parent, and his personal representative, in the event of his death, are estopped from questioning the validity of the adoption procured at his instance, probably all the courts will admit an exception arising out of those cases in which it appears that, while an adoption was intended, the adopting parent never took, and never supposed himself to have taken, the steps declared by statute to be essential to the adoption. Thus, if a statute provides for certain writings, and that upon their execution, acknowledgment, and filing for record the rights, duties, and relations between the parent and child by adoption shall thereafter in all respects be the same that exist by law between parent and child by lawful

birth, it is evident that no legal adoption has taken place, nor has any consummation of it been attempted until the acts specified are done, and until that moment there is at most an intention to make a valid adoption, and this unexecuted intention is not sufficient: *Long v. Hewitt*, 44 Iowa, 363; *Tyler v. Reynolds*, 53 Iowa, 146; *Shearer v. Weaver*, 56 Iowa, 578. While there have been cases in which agreements to adopt a child and make it the heir, or to give it specific property, have been specifically enforced where the child had performed all the agreement to be performed on its part: *Van Tine v. Van Tine*, N. J. Ch., Sept. 12, 1888; 15 Atl. Rep. 249; *Van Dyne v. Vreeland*, 11 N. J. Eq. 370, we apprehend that these cases are not sustainable under the authorities, and that, at least in so far as a statutory adoption is concerned, it cannot be perfected in equity, and that where the parties have not executed an instrument purporting to consummate an adoption, their failure to do so cannot be cured by a suit in equity to obtain for the child the benefit of an adoption agreed to be, but not actually, made: *Sharkey v. McDermott*, 16 Mo. App. 80.

Proceedings for an Adoption are in some of the states commenced by a petition, and a court or judge is authorized to act in the matter. As to the facts to be disclosed by the record, it is certain that they need not be other than the statute expressly requires, and that, while certain conditions precedent may be necessary to support the adoption, these conditions need not be set forth in the petition unless the statute has so declared: *Barnard v. Barnard*, 119 Ill. 92. Furthermore, the petition is liberally construed, and the absence of certain averments in it, conceding them to be essential, may be supplied by the caption. Thus, if the petition commences with the name of the state and county, and says that M. of that county hereby declares, etc., this is a sufficient statement of the place of residence to support the adoption in that county: *Abney v. De Loach*, 84 Ala. 393. When a petition was objected to on the ground that it did not "allege that the child whose adoption is sought is not a sister or aunt of the petitioners, or either of them," the court answered that "without considering whether these are not sufficiently included in the allegation that the child is a foundling, whose parents are unknown, we do not think the technical rules of pleading should be strictly applied in a proceeding of this kind. It is more important that the petition should contain the facts relating to the child and its parents, which may give information to those interested, than that it should be formally correct as a pleading. If practically insufficient, the probate court can order an amendment": *In re Edds*, 137 Mass. 346.

The statutes frequently require the child to be adopted, and the persons adopting it, or both, to be residents of the county where the proceeding takes place. It is doubtful whether the want of such residence as a matter of fact is such an irregularity as to avoid the proceedings. So far as the order or other writing is concerned, any statement therein from which it can be reasonably inferred that the parties are residents of the county is sufficient, and if the adopting parent should falsely state himself to be a resident, both he and his personal representative will be estopped from controverting the statement for the purpose of annulling the adoption: *Estate of Williams*, 102 Cal. 70; *People v. Bloedel*, 16 N. Y. Supp. 837; *Abney v. De Loach*, 84 Ala. 393; *Van Matre v. Sankey*, 148 Ill. 536; *ante*, p. 196. If a statute provides that the consent of the parent or parents of the child must be given, there can be no doubt that their rights as parents cannot be cut off in the absence of such consent, unless, indeed, where the proceeding is judicial, and they have had notice thereof, and an opportunity to resist the action taken. If

by any proper means a parent claims a right to the custody or services of his child, and is resisted on the ground that an adoption has taken place, whereby it has become, in contemplation of law, the child of another, he may, unless cut off by some judicial inquiry and determination already had, show that he did not consent to such adoption, and had no notice thereof, and that it is, therefore, as against him, void: *Luppie v. Winans*, 37 N. J. Eq. 245; *In re Humphrey*, 137 Mass. 84; *Re Chambers*, 80 Cal. 216; *Furgeson v. Jones*, 17 Or. 204; 11 Am. St. Rep. 808. There are, indeed, cases in which the want of consent has been successfully urged in a collateral proceeding to which the parent was not a party, and in which the child's rights of inheritance from the adopting parent have been denied, because it was not shown that its natural parent had consented to, or had notice of, the adoption: *Furgeson v. Jones*, 17 Or. 204; 11 Am. St. Rep. 808.

A natural parent may have been guilty of some offense, or manifested some moral depravity on account of which his rights as parent have been annulled, or he may have abandoned his child to the care of strangers, or exhibited a total indifference to its welfare. Shall it be deprived of the right to be adopted, or of the benefit of an adoption supposed to have been made, because his consent to the adoption has not been had? Thus, where such parent appears for the purpose of asserting his or her supposed right to the custody of the child, the right may be denied where there has been an abandonment of parental duties, and an apparent purpose to relinquish parental claims: *Winans v. Luppie*, 47 N. J. Eq. 302. Generally, whenever a parent has done some act, or been guilty of some misconduct or omission on account of which he has ceased to possess parental rights, he may be disregarded in proceedings for adoption. His consent is not a prerequisite, and notice to him need not be given: *Nugent v. Powell*, Wyo., May, 1893. If, as a result of a suit for divorce, the mother has been awarded the custody of the child, the father is not entitled to be heard in proceedings for its adoption, and though he appears and opposes them, the adoption may be consummated: *Baker v. Strahorn*, 33 Ill. App. 59. Should the mother die and the child be taken to another state, where it is adopted, without seeking the consent of the father or giving him any notice of the proceedings, such adoption is valid, at least between the child and the adopting parents and their personal representative, and entitles it to the estate of the parents after their decease, in preference to their natural heirs: *Estate of Williams*, 102 Cal. 70; 41 Am. St. Rep. The father of an illegitimate child is not a person whose consent is necessary to its adoption, and is, therefore, not entitled to notice of proceedings for that purpose: *Gibson's Appeal*, 154 Mass. 378.

The statutes also require the consent of the adopting parents, and doubtless as against either, no rights can be acquired where it appears that he or she did not consent to the adoption. Though the claim is made that the parent has been guilty of abandoning his child, or of some other misconduct whereby he has forfeited his parental rights, and rendered his consent to the adoption unnecessary, he is entitled to be heard upon this question, and adoption proceedings to which he is not a party, and of which he had no notice, are not binding upon him. The proceedings, though they take place in court, and though "the order may be set aside on petition, appeal, or certiorari," are absolutely void as against a nonconsenting parent where the record shows that such parent was represented by a person "duly appointed by the court for that purpose," but does not affirm that any notice was given to such parent, and no steps were in fact taken to acquire jurisdiction over him. He may, therefore, subsequently maintain an action against the adopt-

ing parent to recover damages for being deprived of the services of the child, if he can establish that he had not been guilty of the alleged abandonment: *Schiltz v. Roenitz*, 86 Wis. 31; *post*, p. . While those questions were perhaps not necessarily determined in this case, it is fairly inferable from the opinion of the court that the adoption proceedings might, notwithstanding the want of notice to the parent, be valid as against the child, and also binding upon the parent, if, as a matter of fact, he had abandoned his child, and therefore belonged to that class of parents not entitled to be consulted respecting the adoption of their children. In some instances the consent of the child to be adopted is also required. Such consent, however, need not appear by any record or writing, unless the statute exacts it, and, in the absence of a record showing dissent, it will be presumed in favor of the adoption proceedings, and in support of a child claiming thereunder, that it consented thereto: *Morrison v. Sessions*, 70 Mich. 297; 14 Am. St. Rep. 500.

In some of the states the officer before whom the adoption takes place is required to examine the parties, or the child, or both, and sometimes it is said that there must be a separate examination, without giving any designation of the character or purpose of such examination. Does the statute mean that they shall be examined as witnesses are examined, or does it mean that they shall be seen merely for the purpose of assisting the officer to determine their respective tastes and characters, and reaching a conclusion whether they are of proper age, and whether the interests of the child will probably be promoted by the proposed adoption? This question remains unanswered, nor is the question material when the validity or effect of the adoption is collaterally in question. The acts to be done rest in the discretion of the officer, and the adoption cannot be collaterally avoided because the examination was or was not of a particular character; nor, when the child is of tender years and not of an age requiring its consent, can the adoption be disregarded because the record shows that it was not examined at all: *In re Johnson*, 98 Cal. 531.

Proceedings to Annul Adoptions.—If the adoption takes place as the result of judicial proceedings, and the order or decree has substantially the attributes of a judgment, it may be attacked in the same manner as other judgments. In some of the states the action of the court may be reviewed upon appeal: *Appeal of Wolf*, 13 Atl. Rep. 760. This appeal, if on behalf of the child, may be prosecuted by its next friend, and where a father appealed for his child, professing to act as its next friend, in a proceeding in which it was alleged that he had deserted and neglected to provide for it for more than a year, it was held that the appeal must stand subject "to the power of the court to dismiss the father as next friend, if shown to be unfit, a next friend being regarded as an officer of the court, removable as such in its discretion": *Murray v. Barber*, 16 R. I. 512. Under a statute designating the persons entitled to appeal as "any petitioner or any such child by his next friend," it was decided that the death of the adopting parent within the time in which he was entitled to appeal did not authorize an appeal by his heirs or next of kin. After referring to the fact that neither of the parties directly named in the statute had prosecuted any appeal, and that an appeal was attempted to be taken by the heirs only, the court said: "Neither of these parties saw fit to appeal at the time the decree was passed. At that time, the petitioner living, it is clear that the heirs presumptive had no right to appeal. They were not petitioners, nor could they, in any legal sense, be the representatives of the petitioner. The adoption of the child

could impose no duties or obligations upon them. Nor had they any vested rights as heirs which the adoption would interfere with. Nothing in this respect, the prospect of which it was not entirely competent for the petitioner to deprive them, either by the adoption of an heir or in various methods known to the law. Nor are their rights increased by her death. If they are deprived of their inheritance, it is by the act of the ancestor legal and competent for her to perform, and by which they must abide. It is equally clear that they cannot appeal as representatives of the petitioner. Nor as heirs, for as such they are acting and must act, if at all, in their own behalf and for their own interests. Not as administrators, if such they were, for the decree is the result of the completed act of the intestate": *Gray v. Gardner*, 81 Me. 554.

A decree of adoption may doubtless be vacated by a court upon such grounds as would entitle it to vacate any other order or decree. In Massachusetts the probate court, in which adoptions must take place, has the general power of correcting "errors arising out of fraud, or mistakes in its decrees." In 1890 a petition was filed in that court by the heirs at law of an adopting parent to revoke and annul the decree of adoption made at her instance in 1884, on the ground that at that time she was of unsound mind, and was induced to present the petition for adoption by fraud and undue influence practiced upon, and exercised over, her. The court was of the opinion that these facts were such that it was authorized to vacate the judgment of adoption for fraud in its procurement, though it was conceded that during the lifetime of the adopting parent her heirs had no right of appeal: *Tucker v. Fisk*, 154 Mass. 574. Probably a decree of adoption may be vacated by a suit in equity for fraud in obtaining it, as where at the time it was sought, and entered, the adopting parent was of weak and unsound mind, and subjected to undue influence, but in the only instance, so far as we are aware, in which this relief was sought it was denied because there was no showing of any fraud on the part of the child other than such as might be inferred from the fact of his being eighteen years of age at the time of the adoption, and his acquiescing therein: *Brown v. Brown*, 101 Ind. 340.

The General Effect of the Adoption of a Child is to change its status and to make it, in contemplation of law, the child of the person or persons adopting it. This is especially true between it and the adopting parent or parents. It is subject to the same duties as a natural child, and hence cannot maintain any action for services rendered while residing with its adopting parents as a part of their family, although it has reached the age of majority, because the presumption here, as in the case of other children residing with, and forming a part of, the family of their parents, irrespective of their age is, that such services as were rendered were given without any understanding that they should be paid for: *Lunay v. Vantyne*, 40 Vt. 501. On the other hand, the obligation of the adopting parent is the same as if he were a natural parent, and hence he is bound to give the child the same support and maintenance, and the same humane treatment to which it would be entitled if born to him in lawful wedlock: *Fosburg v. Rogers*, 114 Mo. 122.

The Right of Inheritance of an Adopted Child in the Estate of his Adopting Parent or parents is the same as if it were a child born to them during marriage: *In re Newman*, 75 Cal. 213; 7 Am. St. Rep. 146; *Morrison v. Sessions*, 70 Mich. 297; 14 Am. St. Rep. 400; *Rowan's Appeal*, 132 Pa. St. 299; *Johnson's Appeal*, 88 Pa. St. 346. An adopted child is entitled in some of the states only to that portion of the estate of the adopting parent which he

could have devised or bequeathed at the time of his death: *Meaderv. Archer*, 65 N. H. 214. In Texas, however, if the adopting parent at the date of his death has a child or children born in lawful wedlock the adopted child can as such succeed to no more than one-fourth of the estate: *Eckford v. Knox*, 67 Tex. 200. The right of an adopted child, like that of any other child or heir, is, however, subject to the testamentary power of the adopting parent, nor can this power be impaired by any agreement made at or prior to the adoption, that the child shall receive a certain portion of the estate, or shall become his sole heir: *Austin v. Davis*, 128 Ind. 472; 25 Am. St. Rep. 456. It is probable that if an adopted child is not named in the will of its adopting parent, it will, nevertheless, like any other lawful child, take the same share of his estate as if he had died intestate. If, however, before the adoption, the child is named as a beneficiary in a will by the name it then bears, and the adopting parent dies without making any further will, the child will not be regarded as omitted from such will, and, therefore, must accept what is therein given to him instead of the share to which he would have been entitled had the adopting parent died intestate: *Bowdlear v. Bowdlear*, 112 Mass. 184.

Of course, if the statute authorizing the adoption confers upon the child adopted the rights of a child by birth, persons who before the adoption were next of kin to the adopting parent, and entitled to certain rights in that capacity, may cease to be his next of kin, and the rights based upon such kinship may terminate. Thus, the next of kin may be entitled to resist the probate of a will, or to institute proceedings to revoke such probate after it has been granted. But, if the testator has adopted a child, who has thereby become his next of kin, or his sole heir, the natural kindred, so long as the adoption remains in force, have no interest in his estate in any contingency, and therefore cannot attack his will: *Estate of Williams*, 102 Cal. 70; 41 Am. St. Rep. If there are any grounds upon which the adoption may be avoided by proceedings to vacate it, those proceedings must be conducted to a successful issue before the will can be assailed. The assault upon the adoption and upon the will cannot be carried on at the same time and as a part of the same proceeding: *Fiske v. Pratt*, 157 Mass. 83.

In some instances conflicts have arisen between the wife of an adopting father and his adopted child, she on her part claiming that he must, so far as her interests are involved, be regarded as dying without issue. If the widow joined in, or assented to, the adoption so that it may be regarded as her act as well as the act of her husband, even conceding that it does not make the child hers to the extent that it would be her heir upon her death, she will generally not be able to maintain that as against her interests the adoption has not given the person adopted the rights of the child of the adopting father. Therefore, if the statutes of the state provide that "if the intestate leaves issue, his widow shall have one-third, and if no issue, one-half" of certain property, she cannot, as against the adopted child, recover more than one-third of such property: *Atchison v. Atchison*, 89 Ky. 488; *Buckley v. Frasier*, 153 Mass. 525; *Rowan's Appeal*, 132 Pa. St. 299. In Indiana, where the widow is entitled to a certain share in the event that her husband leaves a child by a former wife, it was held that a child by adoption is not in legal contemplation a child by a former wife, and therefore that its existence cannot deprive such widow of any interest in the estate of her husband, of which she is deprived only upon his leaving a child of a previous marriage: *Louthain v. Lusher*, 52 Ind. 330; but this position appears to have been abandoned by a majority of the court in the later case of

Markover v. Krauss, 132 Ind. 294. By the statutes of Vermont, if a husband dies without issue, "his widow shall be entitled to the whole of his estate forever, if such estate shall not exceed one thousand dollars, and if the estate shall exceed that sum, the widow shall be entitled to one thousand dollars and one-half of the remainder." Under a special act of the legislature it was enacted "that J. C. C. shall hereafter be known and called by the name of J. C. B., and is hereby constituted heir at law of J. B." The wife of J. B. did not participate in procuring this enactment, and it was held not to affect her rights in his estate after his death. It will be seen that this statute, while it purported to constitute J. C. C. the heir at law, did not in other respects purport to constitute him the child or issue of J. B., and that there was nothing on the face of the statute interfering with the rights of the wife when she should become a widow: *Stanley v. Chandler*, 53 Vt. 619. So far as a surviving wife takes an interest in her husband's estate as his heir, or one of his heirs, we cannot understand that her assent to the adoption is material, except when the statute expressly enacts it as a condition precedent to the validity of the act. She can have no vested right as heir of her husband, nor, indeed, if the law allows him to adopt children without her assent, can she have any vested right to have him die childless. Therefore, if the statute gives to the person adopted the rights of a child of the adopting father, then, if there be a valid adoption, the wife cannot hold as heir what she is entitled to only on the contingency of her husband's dying childless, or without issue. If the adoption is not joint in the sense that it is the act of both spouses, conferring upon both parental rights and obligations, then it is clear that the child adopted does not become the heir of the wife, and cannot as such succeed to her property, whether derived from her husband's estate or otherwise: *Shurkey v. McDermott*, 16 Mo. App. 80.

If an Adopted Child Dies During the Life of Its Adopting Parent, leaving children, such children will for most, if not for all, purposes be regarded as if they were natural grandchildren of the adopting parent, and are entitled to represent their parent and to receive from the estate of his adopting parent what he would have been entitled to receive had he lived until after such parent's death: *Power v. Hasley*, 85 Ky. 671; *Pace v. Klink*, 51 Ga. 220. Therefore, if a legacy is bequeathed to an adopting parent, who dies before the testator, it does not lapse if there is a statute providing that a legacy shall not lapse on the death of a beneficiary leaving lineal descendants, and the statute of adoptions declares that an adopted child becomes, "to all intents and purposes, the child of his adopters, the same as if born to them in lawful wedlock": *Warren v. Prescott*, 84 Me. 483; 30 Am. St. Rep. 370.

A curious complication has arisen in a few instances after the adoption of grandchildren from the death of their parent by birth before that of the grandparent who has adopted them as his children. In such cases the claim has been made that, being children by adoption, they are entitled as such to an inheritance, and that also being children of a deceased child, they are also entitled to represent him, and to receive his distributive share. In Iowa it has been held that they may inherit in both capacities: *Wagner v. Varner*, 50 Iowa, 532; while in Massachusetts the rights recognized are those as adopted children only: *Delano v. Bruerton*, 148 Mass. 619.

It may be urged in favor of the claim of an adopted child to inherit from its adopting parent that the latter has, by the adopting proceedings, directly or impliedly, stipulated in favor of such inheritance. This reason, if reason it be, does not apply against persons who have not participated in the adoption proceedings, and hence there has sometimes been a reluctance to admit

the claims of an adopted child under circumstances in which the claims of a child by birth would not have been denied, and in which the rights of the adopted child were not derived directly from the adopting parent. But the right to be an heir does not rest upon agreement or reason, or, more accurately speaking, it may exist though there is neither agreement nor reason in its support. It is a creature of law, and, so far as heirship by adoption is concerned, of statutory law. Hence we should consult the statute in determining the rights of adopted children and of persons claiming through or under them and should concede the right when the statute has manifestly created it, or has made statements, or prescribed rules which cannot be carried to their logical consequence without creating it.

An adopting parent may have children born to him in lawful wedlock either before or after the adoption. Does the law constitute these children, for the purposes of inheritance or otherwise, the brothers and sisters of the adopted child? In Georgia the adoption of an illegitimate child was held to have the effect of making the children of the same father born in lawful wedlock the brothers and sisters of the child so adopted (*Shelton v. Wright*, 25 Ga. 636), and in a more recent case in the same state this rule, it was intimated, was applicable to other adoptions authorized by law: *Pace v. Klink*, 51 Ga. 220. The court, however, manifestly was influenced by its conviction that adopted children were usually natural children of one of the adopting parents, and were adopted with the intention of placing them upon an absolute equality before the law with the other children equally natural but more legitimate. The reason thus given, while it may sometimes, or even frequently, exist, does not visibly pervade any of the statutes upon the subject, and we doubt the propriety of considering it in construing them. The language employed in the adoption statutes does not generally necessarily confer upon the child adopted any rights of inheritance not derived from or through the adopting parent. Hence such children are not, in contemplation of law, brothers and sisters of the natural children of the same parent or parents, so that the one can inherit from the other in those cases in which the right of inheritance is dependent upon occupying the relation of brother and sister to a decedent or being otherwise his next of kin. If the statute declares that the adopted child shall, for the purpose of inheritance by such child and his descendants, be the child of the parents by adoption the same as if born in lawful wedlock, it will be construed as meaning for the purposes of inheritance from the adopting parent, and will not confer a right of inheritance from any other person, and hence an adopted child cannot inherit from children by birth of the adopting parent, nor they from it: *Keegan v. Geraghty*, 101 Ill. 26; *Helms v. Elliott*, 89 Tenn. 446. In the absence of very explicit language making an adopted child the child of the adopting parents, to all intents and purposes, the act of adoption does not confer upon it kinship with the kindred of such parents, and while it may inherit from such parents, in the event of their dying intestate, it cannot inherit through them property in which they never acquired any interest, but in which they would have received an interest had they survived until the death of one of their natural kindred: *Estate of Sunderland*, 60 Iowa, 732; *Moore v. Estate of Moore*, 35 Vt. 98.

Very often, in Wills, property is devised to a specified person, and, after his death, to his heirs or next of kin, or to his heirs at law, and then in the event of his having an adopted child, the question is, whether such child is included within these words, and therefore entitled to the benefit of the devise or bequest. In the absence of circumstances tending to show that

the testator anticipated the adoption, or knew that it had already taken place, and therefore probably intended to treat the person adopted as a possible beneficiary, the decisions generally exclude the adopted child from the benefit of the will: *Jenkins v. Jenkins*, 64 N. H. 407; *Schafer v. Eneu*, 54 Pa. St. 304; *Wyeth v. Stone*, 144 Mass. 441; *Morrison v. Sessions*, 70 Mich. 297; 14 Am. St. Rep. 500; *Reinders v. Koppelman*, 94 Mo. 338. Even where the testator himself became an adopting parent, the same rule was applied in a case in which it appeared that a devise had been made by him to his children, and he subsequently adopted a child, he being, however, married and having a living child, and the probability of other children, at the time his will was executed: *Russell v. Russell*, 84 Ala. 48. If, on the other hand, a will devises property to a designated person to be held during his life, and after his death to vest in such person as by the intestate laws is entitled to receive his estate, his adopted child, entitled by such laws to his property, is within the benefit of the devise: *Johnson's Appeal*, 83 Pa. St. 346. If the statute authorizing adoptions declares that an adopted child becomes "to all intents and purposes the child of his adopters, the same as if born to them in lawful wedlock," perhaps even in wills such child is entitled to any benefit which may accrue to a natural and legitimate child of such parent. Hence an adopted child has been held to be entitled to a legacy bequeathed to its adopting parent, and which never vested in him because of his death prior to that of the testator. Speaking upon this subject it was said: "It is as competent for the legislature to place a child by adoption in the direct line of descent, as for the common law to place a child by birth there. And this is precisely what the legislature has done, and what it undoubtedly intended to do, when in strong and emphatic language it declared that a legally adopted child becomes to all intents and purposes the child of the adopters, the same as if he were born to them in lawful wedlock": *Warren v. Prescott*, 84 Me. 483; 30 Am. St. Rep. 370. In Massachusetts property was voluntarily transferred to a life insurance company to receive and manage it upon certain trusts "provided for in the declaration, to the settler during his lifetime, and upon his death to transfer the principal sum to his executors or administrators, in trust for the special use and benefit of any child or children" of such settler, and, in case he should die without leaving any issue, then to pay the principal sum to his mother, or, in the event of her death before him, then to his executors or administrators in trust for the use of his heirs at law and the heirs at law of his mother. Many years afterwards the settler and his wife presented a petition to the probate court for the adoption of a minor child, and such proceedings were thereafter taken that the child was adopted in conformity to the statutes of Massachusetts, and afterwards the adopting father died leaving no child or issue other than such adopted child. It was insisted that this child was not one contemplated by the deed of trust, and therefore that the adopting father must be considered as having died childless, and without issue. The statute of that state, upon the subject of adoption, provided that "a child so adopted shall be deemed, for the purpose of inheritance by such child, and all other legal consequences and incidents of the natural relation of parent and child, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock, except that he shall not be capable of taking property expressly limited to the heirs of the body or bodies of the parents by adoption, nor property from the lineal or collateral kindred of such parents by right of representation." The court, in sustaining the claim of the adopted child, said: "This language is very broad and comprehensive, and it was

manifestly the intention of the legislature to provide that, with the exceptions named, that the adopted child should, in the words of the sixth section, to all intents and purposes be the child of the petitioner. The adopted child in this case, therefore, in construing his father's settlement, must be regarded in the light of a child born in lawful wedlock, unless the property disposed of by the settlement falls within one of the exceptions. It is true that if she takes under the settlement the property does not come to her by inheritance, but it comes to her as one of the legal consequences and incidents of the natural relation of parent and child. Does it fall within either exception of the statute? It cannot be claimed that it falls within the last exception as property from the kindred of the parents by right of representation." The court then proceeded to consider the other limitation of the statute forbidding an adopted child to take property expressly limited to the heirs of the body or bodies of the parents by adoption, and held that the trust in question did not limit the property to the heirs of the body of the settler, and therefore that there was no reason why it should not vest in his child by adoption: *Sewall v. Roberts*, 115 Mass. 262. Possibly, to avoid the effect of this decision, the statutes of the state were re-enacted and amended in 1876, so as to declare that "the term 'child' or its equivalent in a grant, trust, settlement, entail, devise, or bequest shall be held to include a child adopted by the settler, grantor, or testator, unless the contrary apparently appears by the terms of the instrument; but when the settler, grantor, or testator is not himself the adopting parent the child by adoption shall not have, under such an instrument, the rights of a child born in lawful wedlock to the adopting parent, unless it apparently appears to have been the intention of the settler, grantor, or testator to include an adopted child." The result of this amendment is that if a trust is created or a devise made in favor of a third person, and, in the event of his dying without issue, then that the property shall vest in the heirs at law of another person who has no heirs other than those created by adoption the latter cannot take the benefit of the devise or trust: *Wyeth v. Stone*, 144 Mass. 442.

Upon the Death of an Adopted Child Intestate, and Without Wife or Descendants, must its heirs at law be sought in the family into which it was born, or in the family of which it became a part by adoption? Has its relationship with its natural parents been destroyed by the act of adoption, by which they relinquished all control over it, and consented that it should become, in law, the child of others? So far as its rights of inheritance are concerned they probably extend to both families, to the extent of entitling it to inherit both from the adopting and the natural parents: *Wagner v. Varner*, 50 Iowa, 532. There is a considerable variance between the statutes in describing the effect of an adoption, and the consequent relation between the child adopted, and the persons adopting it. The general purpose of these statutes, as we understand them, is to detach the child from the family into which it was born, and to attach it to, and make it a part of, the family into which it is adopted. Its natural parents are absolved from all further duties to it, and it is expected to form and generate new affections, and to become, so far as the law may accomplish that result, the child of the persons adopting it. It is therefore a fair construction of statutes of adoption, and of the statutes regulating descents and distributions, to hold that parents adopting are the ones entitled to the estate of the child adopted, in the event of his dying intestate, and leaving both natural and adopted parents; and this is more especially true when such estate has been

acquired by inheritance from one of the adopting parents: *Davis v. Krug*, 95 Ind. 1; overruling *Barnhizer v. Ferrel*, 47 Ind. 335; *Humphries v. Davis*, 100 Ind. 274; 50 Am. Rep. 788. In this conclusion, as we understand them, the majority of the courts do not concur. In the absence of language necessarily controlling, they do not regard the adopting parents as heirs at law of the child adopted, and consider all designations of heirs of such child to refer to its natural, rather than to its adopted, kindred: *Hole v. Robbins*, 53 Wis. 514; *Upton v. Noble*, 35 Ohio St. 655; *Reinders v. Koppelman*, 68 Mo. 494; 30 Am. Rep. 802. The vice of these decisions, in our judgment, lies in the fact that the courts making them gave too strict a construction to statutes of adoption, and were unwilling to concede that such statutes had any other object than to confer the benefit of heirship to the adopting parent upon the child adopted. The purpose of these statutes we conceive to extend further than this, and, in effect, to take the child from its parents by birth, and to give it to the parents by adoption, and to create, as between it and such parents, the reciprocal rights and relations of parent and child, and to give to the former both the incidental and the direct advantages of parentage; and we therefore think that, upon the death of such child intestate, and leaving estate which, by statute, vests in its parents, that the word "parents," as thus used, should be deemed to designate the adopting parents, rather than the parents by birth; for, under the law, it is the former, rather than the latter, who occupy the relation of parent to the child at the time of its death.

In *Considering the Extraterritorial Effect of Adoptions*, two rules, to some extent conflicting, have been brought to bear upon the question, and have resulted in decisions necessarily irreconcilable. It is generally true that the descent of real property is governed by the laws of the state or country in which it is situated, and therefore he who claims it by inheritance must establish his claims under those laws, and in the mode provided thereby, or must fail: *Story's Conflict of Laws*, secs. 484, 484 a. Under the influence of this rule it has been held that if an illegitimate child is made legitimate, or is otherwise given capacity to inherit by some law of the domicile of its origin and residence, or a child of another is adopted, and thus made capable of inheriting from his adopting parent, such laws and acts of adoption can have no effect to control the descent of real property situate in another state or country, and therefore that a child so adopted or legitimized can, outside of the jurisdiction of his adoption or legitimation, maintain no claim as heir of the person or persons to whom such law made him the lawful child or heir: *Smith v. Derr's Admr.*, 34 Pa. St. 126; 75 Am. Dec. 641; *Doe v. Vardell*, 5 Barn. & C. 438; 6 Bing. N. C. 385; *Lingen v. Lingen*, 45 Ala. 410; *Barnum v. Barnum*, 42 Md. 307. On the other hand, it is said to be "a well-settled principle that a *status* or condition as to legitimation must be determined by reference to the law of the country where such *status* or condition had its origin," and hence it was decided that an illegitimate child whose parents subsequently married and then removed into another state, must be regarded as illegitimate in the latter state, because the marriage did not legitimize it in the state where it was born and the marriage contracted, though had the birth or marriage taken place under the same circumstances where the right of inheritance was claimed it would have there sustained such claim: *Smith v. Kelly's Heirs*, 23 Miss. 167; 55 Am. Dec. 87. The manifest tendency of the recent American decisions is to treat adoption as fixing the *status* of the child adopted both in the state of its domicile where the adoption takes place and in every other state in

which its claims as an adopted child may be asserted: *Estate of Williams*, 102 Cal. 70; 41 Am. St. Rep.; *Scott v. Key*, 11 La. Ann. 232. This effect is well expressed in the principal case in the following language: "The proceeding in this case was in the nature of a proceeding *in rem*, the purpose being to change the *status* of the child in her relation to said Samuel Sankey. The decree of adoption was a declaration by competent authority, operative to change her *status*, and, *ipso facto*, to render her what she was declared to be, the heir at law of Samuel Sankey, and capable of inheriting from him, in all respects, as if she had been his child born in lawful wedlock: 2 Black on Judgments, 792 et seq. The statute under which the adoption proceedings were had, provides that the child shall be decreed to take the name of the adopting parents, 'and have all the rights of a child and heir of such adopting parents, and be subject to the duties of such child.' The decree, by force of this statute, established, *eo instanti* its rendition, the relation of parent and child, imposed upon the parties the reciprocal duties and obligations of that relation, and impressed upon, and invested the child with, the rights and qualities of a child and heir at law of Samuel Sankey. This we understand to be the construction of the statute by the courts of that state: *Wolf's Appeal*, Pa., Apr. 23, 1888. The *status* of appellee having been established under and existing by virtue of the *lex domicilii* is to be recognized and upheld in every other state, unless such *status*, or the rights flowing therefrom, are inconsistent with, or opposed to, the laws and policy of the state where it is sought to be availed of": *Van Matre v. Sankey*, 148 Ill. 558; *ante*, p. 196. The leading case upon this subject is *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321, wherein all the authorities on the subject, then existing, whether English or American, are considered, and the following conclusions announced: "It is a general principle, that the *status* or condition of a person, the relation in which he stands to another person, and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicile; and that this *status* and capacity are to be recognized and upheld in every other state, so far as they are not inconsistent with its own laws and policy. Subject to this limitation, upon the death of any man, the *status* of those claiming succession or inheritance in his estate is to be ascertained by the law under which that *status* was acquired; his personal property is, indeed, to be distributed according to the law of his domicile at the time of his death, and his real estate descends according to the law of the place in which it is situated; but in either case, it is according to those provisions of that law which regulates the succession or the inheritance of persons having such a *status*. . . . A person, for instance, who has the *status* of a child of another person in the country of his domicile, has the same *status* here, and as such takes such share of the father's personal property as the law of the domicile gives him, and such share of his real estate here as a child takes by the laws of this commonwealth, unless excluded by some positive rule of our law. Inheritance is governed by the *lex rei sitæ*; but legitimacy is to be ascertained by the *lex domicilii*. If a man domiciled in England has two legitimate sons there, and dies intestate, owning land in this commonwealth, both sons have the *status* of legitimate children here; but, by virtue of our statute of descents, the lands descends to them equally, and not to the eldest son alone, as by the law of England. . . . The law of the domicile of the parties is generally the rule which governs the creation of the *status* of a child by adoption: *Foster v. Waterman*, 124 Mass. 592; 4 Phillim., sec. 531; Wharton on Conflict of Laws, sec. 251. The *status* of the demandant, as adopted child of the

intestate, in the state in which both were domiciled at the time of the adoption, was acquired in substantially the same manner, and was precisely the same so far as concerned his relation to, and his capacity to inherit, the estate of the adopting father, as that which he might have acquired in this commonwealth, had the parties been then domiciled here. In this respect there is no conflict between the laws of the two commonwealths. The difference between them in regard to the consent of the wife of the adopting father, and to the inheritance of estates limited to heirs of the body, or inheritance from the kindred, or through the children, of such father, is not material to this case, in which the only question is whether the adopted child or a brother of the adopting father has the better title to the land in the absolute ownership of such father at the time of his death. Whatever effect the want of formal consent, on the part of the wife of the intestate, to the adoption of the demandant might have, if she were claiming any interest in her husband's estate, it can have no bearing upon this controversy between the adopted child and a collateral heir."

It may be that both the state in which an adoption has taken place and that in which rights of inheritance are claimed thereunder have laws authorizing the adoption of children of other persons, but differing as to the rights of inheritance conferred by such adoption. In such cases it is believed that the rights are restricted by the laws of the latter state, and that an adopted child cannot recover, as heir, property to which he is not entitled by the laws of the state in which the question arises, though there would be no doubt of the validity of his claim if it related to property within the state where he was adopted: *Keegan v. Geraghty*, 101 Ill. 26.

In some of the states provision has been made for adoptions effected in other states, by requiring a transcript of the record of such adoption to be filed and entered upon the order book of some circuit court within the state. Such adoption thereafter has the same force and effect, and such adopted child has the same rights, as if the original adoption had occurred in the state, and, on the other hand, until the statute has been complied with, the courts of the state will not recognize or enforce rights based upon adoptions taking place in another state: *Markover v. Krauss*, 132 Ind. 294.

OLDFIELD v. EULERT.

[148 ILLINOIS, 614.]

THE RIGHT OF REDEMPTION BEING PURELY STATUTORY must be exercised in the manner prescribed by statute.

THE REDEMPTION OF PART OF A TRACT, or of one of two or more tracts sold *en masse*, cannot be made.

REDEMPTION.—IF TWO OR MORE LOTS ARE SOLD TOGETHER under execution, a judgment creditor who seeks to redeem from the sale must cause all the lots to be sold together under his execution, in like manner, in order to consummate the redemption, and if he sells them separately he abandons his redemption, and is regarded as making his sale wholly independent of it.

EXECUTION—OFFICER ACTING BEYOND THE COUNTY.—If lands situate in two counties are sold under a decree, from which sale a right of redemption exists, and a judgment creditor wishes to exercise his redemption right

in such lands, and places his execution in the hands of the sheriff of one of such counties, that officer has power to levy upon and sell the lands in both counties, for otherwise it would be impossible for the judgment creditor to exercise his right of redemption at all.

C. W. Brown, for the appellant.

R. E. Barber, and Haley and O'Donnell, for the appellees.

615 SHOPE, J. This was a bill in chancery, by appellees, to quiet title in themselves, and to remove, as a cloud upon their title, a deed from George Hoffmeier to appellant, dated August 25, 1890, and decree was entered accordingly. The bill alleges, and the answer admits, that in May, 1884, said Hoffmeier, being the owner of two adjoining tracts of land, one lying in Will, and the other in Du Page, county, joined by his wife, made and delivered to Joseph Yackley their deed of mortgage upon both of said tracts to secure payment of six thousand three hundred and seventy-five dollars, and, on the thirteenth day of October, 1887, executed and delivered their second mortgage to said Yackley to secure the further sum of fourteen hundred dollars upon all of said land; that the sums secured, respectively, being past due and unpaid, Yackley filed his bill in the Du Page circuit court to foreclose both of said mortgages; that at the March term, 1889, of said court a decree of foreclosure was entered, and the master in chancery of that court ordered to sell the mortgaged premises; that the master, conformably to the decree, sold the same *en masse*, to Yackley, and a certificate of purchase issued to him accordingly. No question is made as to the regularity of the decree of foreclosure and sale to Yackley.

616 It is also admitted that appellees, severally, obtained judgments at law against Hoffmeier in the Will county circuit court, and no redemption having been made from said foreclosure sale within twelve months from its date, after the expiration of twelve months, and within fifteen months from the date of such sale, executions issued on said judgments, the same being in full force, directed to the sheriff of Du Page county, and were delivered to him by appellees, who at the same time paid said sheriff the amount of the bid of said Yackley at said sale, with interest and costs, and said sheriff, on the same day, indorsed a levy on said executions upon said lands, and each tract thereof, and made and filed a certificate of redemption as required by the statute (Rev. Stats., c. 77, sec. 19), and thereupon advertised a sale of said land as pro-

vided by law (Rev. Stats., c. 77, sec. 20), and on June 28, 1890, sold the same to appellees *en masse*, for an advance of twelve hundred and seventy dollars and ninety-six cents upon the redemption money paid, and issued his certificate of purchase accordingly. The premises not having been redeemed from this sale as provided by law (Rev. Stats., c. 77, sec. 23), the sheriff, on September 1, 1890, made and delivered his deed for said lands to appellees. On the twenty-seventh day of August, 1890, appellant, for an expressed consideration of four hundred dollars, procured a quitclaim deed from Hoffmeier to himself to the Will county land, and is claiming thereunder to be the owner of it, and asserting right to the possession thereof, and to the accrued and accruing rents and profits.

That the general executions issued to Du Page county, upon appellees' judgments in the Will county circuit court, were valid writs, and empowered the sheriff of Du Page county to levy upon and sell, to satisfy the same, any property of the debtor in his county not exempt by law, does not, upon this record, admit of question, and it necessarily follows that appellees, as judgment creditors, had, under said executions, the right to redeem the land of the debtor within that county from prior judicial sales, within the time and in the mode prescribed ⁶¹⁷ by the statute for such redemption: Rev. Stats., c. 77, sec. 20. Appellees having strictly pursued the provisions of the statute, there was a valid redemption of the land in Du Page county, and by the statute it became subject to resale, under these executions, for the repayment of the redemption money, and to satisfy the appellees' judgments, etc.

The right of redemption is purely statutory (*Durley v. Davis*, 69 Ill. 133), and must be exercised in the manner prescribed by the statute. It is provided, chapter 77, section 25, that any person entitled to redeem may redeem the whole or any part of the premises in like distinct parcels or quantities in which the same are sold, and it is well settled that where two or more lots or tracts of land have been sold *en masse* the redemption can only be *en masse*—there can be no redemption of a part: *Hawkins v. Vineyard*, 14 Ill. 26; 56 Am. Dec. 487; *Oliver v. Crosswell*, 42 Ill. 41. Having the right to redeem as to the Du Page county land, the redemption necessarily was of both tracts sold. It does not follow, however, that because redemption has in fact been effected, appellees

acquired title to the land. There must not only have been redemption, but also a levy of a valid execution, and a sale by the person or officer authorized by law to make the same, followed by a deed made in conformity with the statute: *Meyer v. Mintonye*, 106 Ill. 414; *Turney v. Young*, 22 Ill. 255; *Richards v. Hyde*, 21 Ill. 640; *Brooks v. Sanders*, 110 Ill. 455.

We have in this case no question of the validity of the judgment or process upon which the redemption and sale were made, as in the cases last cited; but the question is, whether, admitting redemption was made, the sheriff of Du Page county was by law authorized, under the executions in his hands, to sell, and if no redemption was made from such sale, to convey the land in Will county. It is true, as contended by counsel for appellant, that sheriffs are, under our laws, county officers, and their duties, unless otherwise prescribed by law, are to be performed within their counties, respectively. Ordinarily, ⁶¹⁸ an execution, whether issued upon a judgment in his own county or another, will authorize the sheriff to whom it is directed to levy upon and sell property to be found in his county only, and if none can be there found it will be his duty to return the writ accordingly. But no reason exists why the legislature may not confer power upon sheriffs to sell lands not lying within the county, or to perform other duties in respect of property within the state. Such power is constantly exercised in sales under decrees in chancery throughout the state, without detriment to any public or private interest. Has this power been conferred on sheriffs in cases like the one at bar?

We said in *Schuck v. Gerlach*, 101 Ill. 338: "Redemptions are looked upon with favor, and, where no injury is to follow, a liberal construction will be given our redemption laws, to the end that the property of the debtor may pay as many of the debtor's liabilities as possible." When the time in which the debtor may redeem from a valid sale of his property has expired he has no further right to, or interest in, the property sold: *Jones v. Thompson*, 26 Ill. 177; *Massey v. Wescott*, 40 Ill. 160; *Pearson v. Pearson*, 131 Ill. 464; *Smith v. Mace*, 137 Ill. 68; and any excess over the amount necessary to redeem must be lost to him, unless, by redemption, it is further applied in payment of his debts. To facilitate this humane purpose, as well as to protect junior judgment and decree creditors, successive redemptions are allowed. The ~~rule~~ ^{rule},

being remedial, is to be construed liberally to effectuate the remedy and carry out its evident spirit and purpose.

We have already seen that when tracts of land are sold *en masse* they can be redeemed only in like manner, and it is equally well settled that the sheriff, in selling under the execution upon which redemption is made, must offer and sell the land *en masse*. In *Oliver v. Croswell*, 42 Ill. 41, this court held that when two lots of land had been sold together under execution, a judgment creditor who seeks to redeem from such ⁶¹⁹ sale must cause the lots to be sold together under his execution in like manner as they were sold originally, in order to consummate the redemption, and that when he caused the lots to be sold separately on his execution he was to be regarded as having abandoned his redemption and to have made his sale wholly independent of it. The reason for the rule is obvious. When sales are thus made it would be impossible to determine what portion of the money required to redeem should be applied in redemption of each separate tract, hence the statute allows redemption to be made only in like parcels and quantities in which the land was sold, and having redeemed *en masse*, as he must do, the statute (c. 77, sec. 21), provides that the redeeming judgment or decree creditor "shall be considered as having bid at such sale (i. e., the sale on his execution), the amount of the redemption money so paid by him," to redeem, with interest and costs. If no more is bid, the premises redeemed are to be struck off to the person making the redemption, at that bid, and a deed is to be forthwith executed; but if more is bid than the redemption money, interest, and costs of the redemption and sale, redemption therefrom is again allowed within sixty days from the last sale (sec. 22), and so on, until a sale shall be made at which no more than the redemption money, interest thereon, and costs shall be bid: Sec. 23.

It is manifest that the sheriff or the creditor is not authorized to divide up the bid the creditor is to be held to have made in consummation of his redemption, and to apportion it upon the tracts of land severally. An attempt to do so would be a clear departure from the mode prescribed by the statute, an observance of which alone authorizes redemption. If, then, when land is sold *en masse* lying in two or more counties it can only be redeemed together, and must be offered and sold *en masse* after redemption, it follows, that if the sheriff of one county or the other cannot sell under an

execution directed to him, no statutory redemption can be made. That such ⁶²⁰ cases may frequently occur will be conceded, and it must be presumed that they were within the legislative contemplation in the passage of the acts providing for redemption. It is clear from the language of section 20 of the act, that it was intended to confer a right of redemption upon judgment and decree creditors in all cases where the debtor may redeem under the statute, and fails to do so within the time limited. If the redemption is not made by the debtor within twelve months, as provided in section 18 of the act, then any judgment or decree creditor may, within the three months following, redeem, and the manner of perfecting the redemption, in all cases falling within the statute, is prescribed: Sec. 20. No one will for a moment question the right of the debtor to redeem from the foreclosure sale, and, if he had such right, and failed to exercise it as prescribed, the right is by the statute expressly conferred on judgment creditors.

The right to redeem by a judgment or decree creditor, when the redemption is made in accordance with the provisions of the statute, carries with it the right to have the property sold upon the execution under which the redemption is made, to repay the redemption money, interest thereon and costs, and in satisfaction of the redeeming creditor's execution. Section 20 prescribes that upon the redemption being made, the sheriff, or other proper officer having the execution under which the redemption is made, shall advertise and offer the premises for sale under the execution, as in other sales on like process. The power of the sheriff is not limited to sale of property in his county, but the duty is imposed, generally, to sell the premises redeemed, and his authority to thus sell is not at all affected by the fact that one or more of the tracts of land included in the redemption are situated in another county. In respect of the debtor, and his rights in the property, the judgment creditors were, by their redemption under valid process, substituted for the original purchaser, and all the rights and equities he acquired by his purchase, by operation of law, ⁶²¹ passed to and vested in them, to be worked out for their benefit by a resale of the property under their executions: *Herdman v. Cooper*, 138 Ill. 583; *Shroeder v. Bauer*, 140 Ill. 135; *Smith v. Mace*, 137 Ill. 68.

The redemption, so far as it depended upon the validity of the process and the acts of the creditors seeking to redeem,

was made in conformity with the law, and the sheriff of DuPage county, in execution of the writs in his hands, was authorized and required by the statute to complete the redemption by a sale of the property as a whole, in like manner as it had been sold at the prior sale. When appellant obtained his deed from Hoffmeier the right of redemption of the latter had expired, and his rights were gone. At most, Hoffmeier could only have had a right of redemption from the sale under appellees' executions. Neither the debtor nor appellant, or any other person, made redemption therefrom, and, upon expiration of the time allowed therefor, the sheriff, in conformity with the statute, executed and delivered his deed, conveying the property to appellees, as he was by the statute required to do. We are of opinion that thereby the title to the land in controversy was conveyed to appellees, and that appellant took nothing by his deed from the debtor.

It is also urged that appellees, at the time of filing their bill, were not in possession of the premises, or, if they were, that their possession was tortious, and therefore the bill cannot be maintained. No profit could be derived by an extended discussion of the facts pertaining to that subject. It must suffice that we have carefully considered the pleadings and evidence, and are of opinion that, as against appellant, the chancellor was warranted in finding that appellees were not only in the peaceable, but rightful, possession of the property.

The decree of the circuit court, in accordance with the prayer of the bill, was correctly entered, and will be affirmed.

Decree affirmed.

EXECUTION—REDEMPTION.—The right to redeem cannot be enforced unless the terms prescribed by the statute be strictly pursued: *Hill v. Walker*, 6 Cold. 424; 98 Am. Dec. 465; *Waller v. Harris*, 20 Wend. 555; 32 Am. Dec. 590, and note; *Ex parte Bank of Monroe*, 7 Hill, 177; 42 Am. Dec. 61, and note; *Teabout v. Jaffray*, 74 Iowa, 29; 7 Am. St. Rep. 466, and note; *Sullivan v. Berry*, 83 Ky. 198; 4 Am. St. Rep. 147; *Ewing v. Cook*, 85 Tenn. 332; 4 Am. St. Rep. 765, and note.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

ASHMEAD v. REYNOLDS.

[134 INDIANA, 139.]

FRAUDULENT CONVEYANCES—WHEN ANNULLED.—If there is great weakness of mind in a person executing a conveyance, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity, upon proper and reasonable application of the injured party, or his representatives or heirs, will interfere and set the conveyance aside.

FRAUDULENT CONVEYANCES—UNDUE INFLUENCE.—A COMPLAINT IN AN ACTION TO SET ASIDE A FRAUDULENT CONVEYANCE, alleging the relations of the parties, the great age and feebleness of intellect of the grantor, the persistent and long-continued importunities of the grantee, the gross inadequacy of consideration, together with the nature of the transaction, and the circumstances surrounding it, joined with general allegations of undue influence and fraud, is sufficient.

APPELLATE PRACTICE—REVIEW OF ERROR HOW SECURED.—To bring an alleged error before the appellate court for review it must, in general, be first brought to the attention of the trial court, so that, if error in fact exists, it may be corrected in that court.

PRACTICE.—FINDINGS OF FACT by the court, if within the issues presented by the pleadings and supported by the evidence, cannot be contrary to law.

M. W. Fields, J. W. Ewing, C. A. Buskirk, and J. W. Brady, for the appellants.

A. P. Twineham, W. D. Robinson, and L. C. Embree, for the appellees.

140 HOWARD, J. This was an action by appellees against appellants to set aside deeds, and for partition of lands. It is here on appeal for the second time: *Ashmead v. Reynolds*, 127 Ind. 441. On the former trial there was a judgment for

appellees, which was reversed on the appeal, for the reason that the original complaint did not allege a sufficient disaffirmance of the deeds.

On the return of the case for a retrial, an amended complaint was filed in two paragraphs. The cause was tried by the court, and, at the request of appellants, the court found the facts specially, finding for appellees under the first paragraph of the complaint.

The appellants assign as errors the overruling of the demurrer to the first paragraph of the complaint, the conclusions of law on the facts found, and the overruling of the motion for a new trial.

The first paragraph of the complaint alleges, that, on the twenty-eighth day of May, 1888, Joseph H. Reynolds was the owner of the land described in the complaint; that on said day, and for more than six months prior thereto, the said Joseph H. Reynolds was more than eighty years old, sick, and greatly enfeebled both in body and mind, and by reason thereof easily susceptible to the influence, arts, and persuasions of others, and during said period of time the appellant, Joseph R. Ashmead, who was the nephew of said Reynolds, well knowing his weak and enfeebled condition, as aforesaid and corruptly contriving and intending to profit thereby, and to defraud the said Reynolds out of said farm, made frequent visits to him, and by means of continuous, persistent, and undue ¹⁴¹ persuasion and importunity, and undue, corrupt, and overpowering influence exercised by the said Ashmead, over and upon the said Reynolds, so wrought upon the mind and inclinations of said Reynolds, that, on said day, the said Ashmead procured from said Reynolds an agreement in writing, whereby said Reynolds agreed and undertook—without any consideration therefor, whatever, at the time paid or given by the said Ashmead, and without the said Ashmead having promised or agreed to return or pay any reasonable or adequate consideration therefor—to convey to said Ashmead the lands and farm aforesaid; and pursuant to said agreement, and by the means aforesaid, said Ashmead on said day procured from said Reynolds, in consummation of said agreement, certain deeds of conveyance, which were then executed by said Reynolds to said Ashmead, and which purported to convey in fee simple said lands to said Ashmead; nor has said Ashmead ever paid or given any consideration for said deeds whatever; that at the time of the execution of the agreement and con-

veyances the lands were of the value of nine thousand dollars; that neither said agreement nor said deeds were the act or deed of said Reynolds, but were procured by said Ashmead through the corrupt, fraudulent, and dishonest practices and means aforesaid, by which the will and intent of said Reynolds were by the said Ashmead wholly overpowered and controlled; that at said time said Reynolds had many relatives who were nearer of kin to him than the said Ashmead, and were the proper subjects of his bounty, which relatives and their descendants are the appellees; that afterwards, on the eighteenth day of August, 1888, the said Reynolds departed this life intestate, leaving as his sole heirs the appellees and said appellant; that after his death, and prior to the commencement of this action, appellees disaffirmed said deeds and agreement, and notified said Ashmead ¹⁴³ that the same had been procured by fraud and the undue practices and influences aforesaid, and that they refused to be bound by the same, whereupon said Ashmead declared that he was the exclusive owner of said lands by virtue of said deeds; that he had it solid and proposed to hold the same; setting out also the respective ownerships of the parties to said lands, and praying the cancellation of said deeds and for partition.

The court below held this complaint sufficient. Appellants contend that it is not, claiming that the facts constituting undue influence and fraud are not sufficiently stated. The allegations, in this respect, are that Reynolds was greatly enfeebled in mind and body, and over eighty years of age, when he made the deeds, and that he died between two and three months thereafter; that his feeble condition of mind and body had existed for six months before the time of making the deeds, rendering him easily influenced by others, and that during this period Ashmead, who was the nephew of Reynolds, well knowing his weak and enfeebled condition, corruptly contriving and intending to profit thereby, and to defraud Reynolds of his said farm, made frequent visits to him, and by means of continuous, persistent, and undue persuasion and importunity, and undue overpowering influence, so wrought upon the mind of Reynolds as to persuade him to deed, without consideration, his farm, then worth nine thousand dollars; that said deeds were not the act or deed of Reynolds, but of Ashmead, by whom the will and intent of Reynolds were wholly overpowered and controlled.

In *Wray v. Wray*, 32 Ind. 126, the following is quoted and

approved: "Where a party is weak and enfeebled in mind by reason of age, or from any other cause, and another takes advantage of such weakness, and by any artifice, or cunning, or undue influence he may possess, ¹⁴³ or by any improper practices, induces such person to execute a contract, which, in the free use and exercise of his deliberate judgment, he would not have entered into, such a contract would be set aside for fraud."

In 8 Am. & Eng. Ency. of Law, 649, undue influence is defined to be "any improper or wrongful constraint, machination, or urgency of persuasion whereby the will of a person is overpowered, and he is induced to do or forbear an act which he would not do, or would do, if left to act freely. It generally occurs where one of the parties is weak in intellect or so situated or related to the other as to be peculiarly under his influence. 'It matters not what the relation is, if confidence is reposed and influence obtained.'" And the same authority, in a note, adds: "Where one of the parties is very old and feeble, illiterate, weak-minded, or intoxicated, very slight additional circumstances of suspicion will cast the burden on the other party."

In *Allore v. Jewell*, 94 U. S. 506, a case similar to this, Mr. Justice Field, speaking for the court, said: "It is not necessary, in order to secure the aid of equity, to prove that the deceased was at the time insane, or in such a state of mental imbecility as to render her entirely incapable of executing a valid deed. It is sufficient to show that, from her sickness and infirmities, she was at the time in a condition of great mental weakness, and that there was gross inadequacy of consideration for the conveyance. From these circumstances, imposition or undue influence will be inferred."

"In the case of *Harding v. Wheaton*, reported in 2 Mason, 378, a conveyance executed by one to his son-in-law, for a nominal consideration, and upon a verbal arrangement that it should be considered as a trust for the maintenance of the grantor, and after his death for the benefit of his heirs, was, after his death, set aside, ¹⁴⁴ except as security for actual advances and charges, upon application of his heirs, on the ground that it was obtained from him when his mind was enfeebled by age and other causes. 'Extreme weakness,' said Mr. Justice Story, in deciding the case, 'will raise an almost necessary presumption of imposition, even when it stops short of legal incapacity; and though a contract, in the

ordinary course of things, reasonably made with such a person, might be admitted to stand, yet if it should appear to be of such a nature as that such a person could not be capable of measuring its extent or importance, its reasonableness or its value, fully and fairly, it cannot be that the law is so much at variance with common sense as to uphold it.' The case subsequently came before this court, and, in deciding it, Mr. Chief Justice Marshall, speaking of this, and, it would seem, of other deeds executed by the deceased, said: 'If these deeds were obtained by the exercise of undue influence over a man whose mind had ceased to be the safe guide of his actions, it is against conscience for him who has obtained them to derive any advantage from them. It is the peculiar province of a court of conscience to set them aside. That a court of equity will interpose in such a case is amongst its best-settled principles': *Harding v. Handy*, 11 Wheat. 125.

"The same doctrine is announced in adjudged cases, almost without number; and it may be stated as settled law, that whenever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness, or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will, upon proper and reasonable application of the injured party or his representatives or heirs, interfere and set the conveyance aside": See, also, *Spargur v. Hall*, 62 Iowa, ¹⁴⁵ 498; *Davis v. Dean*, 66 Wis. 100; *Wartemberg v. Spiegel*, 31 Mich. 400; *Birdsong v. Birdsong*, 2 Head, 289; *Samuel v. Marshall*, 3 Leigh, 567; *Ikerd v. Beavers*, 106 Ind. 483.

In the case before us the maker of the conveyances, as alleged in the complaint, "was more than eighty years old, sick, and greatly enfeebled both in body and mind," while the consideration given for the property was certainly grossly inadequate, if, indeed, there was any consideration at all. It would seem, in addition, that the allegations of undue influence, or rather of complete ascendancy over the will of the aged man by his young relative, are full and complete. It is not necessary to state in a complaint all the facts going to establish the fact of undue influence; such facts are, for the most part, evidentiary, and so may be made matter of proof. In this case the necessary allegations—those as to the relations of the parties, particularly the great age and feebleness of intellect of the grantor, and the persistent and long-continued

importunities of the grantee, the gross inadequacy, or rather the want of consideration, and other circumstances surrounding the transaction, and the nature of the transaction itself—are fully made; and these, joined with the general allegation of undue influence and other allegations indicating fraud, are sufficient.

“Fraud is not a thing susceptible of ocular observation or physical demonstration. Yet its existence in a given case may be sufficiently demonstrated for judicial purposes, and to warrant judicial action, by intrinsic evidence of unfairness in the contract or transaction itself”: *Burch v. Smith*, 15 Tex. 219; 65 Am. Dec. 154. See, also, 1 Story’s Equity Jurisprudence, 246; *Reed v. Peterson*, 91 Ill. 288; *Fisher v. Bishop*, 108 N. Y. 25; 2 Am. St. Rep. 357; *Cadwallader v. West*, 48 146 Mo. 483; *Miller v. Rivers*, 138 Pa. St. 270; *McCormick v. Malin*, 5 Blackf. 509; *Marshall v. Billingsly*, 7 Ind. 250; *McLean v. Equitable Life etc. Soc.*, 100 Ind. 127; 50 Am. Rep. 779.

The authorities adduced by appellants are not in point, as we think.

In *Darnell v. Rowland*, 30 Ind. 342, the well-established rule is stated, that weakness of mind alone does not render one incapable of making a contract. Such weakness of mind, however, the opinion states, may become a controlling circumstance when connected with others facts tending to establish fraud. *Wray v. Wray*, 32 Ind. 126, is rather against the position taken by appellants. In *Jagers v. Jagers*, 49 Ind. 428, the rule is repeated, that mere “feebleness of mind has never been held sufficient to set aside a deed, where the grantor was of sound mind.” The court, in that case, however, adds that “some of the authorities hold that it may be taken into consideration, in connection with other circumstances.” In that case, no other circumstances were stated in the complaint. The case is quite unlike the one now before the court. The grantor in that case was of sound, though feeble, mind, and the representations made to him by his wife were concerning matters equally within the knowledge of both parties.

What has been said concerning the demurrer to the complaint applies, in great measure, to the second assignment of error, that the court erred in its conclusions of law on the facts found. The facts found by the court are substantially the facts which are alleged in the complaint, and which, by the assignment of error, are thus admitted to be true.

That the finding by the court was not more complete, or

that some of the issues were not passed upon in the ¹⁴⁷ finding, cannot be considered under this assignment of error.

To bring an alleged error before this court for review, it must, in general, be first brought to the attention of the trial court, so that, if the error in fact exists, it may be corrected in that court. There was, in this case, no motion for a *venire de novo*, no motion for judgment for appellants on the finding, nor any reason given in the motion for a new trial calling the court's attention to any error in the finding, if such error existed.

But we have carefully considered the findings made by the court, and are of opinion that all the material facts put in issue by the pleadings are fully found. From these facts so found the conclusions of law stated necessarily follow, that the deeds in question are void, and that appellees and appellant Joseph R. Ashmead are the owners, as tenants in common, of the lands therein described, and attempted to be conveyed, and that said lands should be partitioned amongst them in the proportions named.

The reasons given for the motion for a new trial are: That the finding is not sustained by the evidence, and that it is contrary to law. There is certainly evidence in the record to support the finding, and that, according to the well-known rule of this court, is sufficient. Why the finding should be held contrary to law we are not informed. The finding is within the issues presented by the pleadings, and is supported by the evidence; it cannot, consequently, be contrary to law.

We have found no available error in the record. The judgment is therefore affirmed, with costs.

DEEDS—SETTING ASIDE—UNDUE INFLUENCE—INADEQUATE CONSIDERATION.—A deed may be avoided by the vendor when an undue influence has been exercised by the vendee on an aged vendor of weak mind: *Beville v. Jones*, 74 Tex. 148; *Graham v. Burch*, 44 Minn. 33; *Kelly v. Smith*, 73 Wis. 191; *Mailack v. Shaffer*, 51 Kan. 208; 37 Am. St. Rep. 270, and note. A deed by a nephew of weak intellect, of all his land to his uncle for an inadequate consideration, where the deed was obtained by exciting his fears in reference to a pretensive claim asserted for that purpose, will be set aside: *Gaston v. Bennett*, 30 S. C. 467. See, also, *Moore v. Moore*, 81 Cal. 195. A deed executed by a weak man in necessitous circumstances, by which he transferred his rights for a most inadequate price, will be set aside: *Burch v. Hurst*, 3 Desaus. Eq. 273; 5 Am. Dec. 549. See the extended notes to *Gant v. Hunsucker*, 55 Am. Dec. 411, and *McArthur v. Johnson*, 93 Am. Dec. 596, where this subject is thoroughly discussed.

APPEAL—ERROR NOT OBJECTED TO BEFORE THE TRIAL COURT cannot be reviewed on appeal: *Simon v. State*, 31 Tex. Crim. Rep. 186; 37 Am. St.

Rep. 802, and note; *Cronfeldt v. Arrol*, 50 Minn. 327; 36 Am. St. Rep. 648; *Williams v. Chicago etc. Ry. Co.*, 112 Mo. 463; 34 Am. St. Rep. 403. See, further, on this subject, the extended note to *Chapman v. City Council*, 13 Am. St. Rep. 685.

COMEGYS v. EMERICK.

[134 INDIANA, 148.]

PLEADING.—A COMPLAINT MUST BE CONSTRUED according to its general scope and tenor, as appears from the averments, and the prayer does not control and determine its sufficiency. If the trial court has placed a reasonable construction upon averments, which might bear two constructions, the appellate court is always disposed to adhere to the construction of the trial court.

EXECUTOR'S SALES—COLLATERAL ATTACK.—If the record shows that an executor's sale was made to a third person, not disqualified from purchasing, the fact that the executor was the real purchaser must be shown by proof *dehors* the record, and the sale is not void, but voidable, and has full force and effect until set aside in proper proceedings.

JUDICIAL PROCEEDINGS—COLLATERAL ATTACK.—Parties and privies to judicial proceedings cannot show their invalidity in collateral proceedings by bringing forward matter extraneous to the record.

EXECUTOR'S SALE—TRUST WHEN ARISES.—If an executor purchases indirectly of himself through a third person, the estate is held in trust by such executor for the heirs at law or other persons interested, who may have the trust declared upon proper application.

F. Winter and J. B. Elam, for the appellants.

H. J. Milligan, for the appellees.

148 OLDS, J. Levy Comegys died testate, owning certain real estate in Marion county, Indiana. The appellant Olivia Comegys, who was the widow of the testator, took under the law, and by partition a portion of the real estate so owned by the testator was set off to her. The ¹⁴⁹portion so set off to the widow being of greater value than her interest in the whole, it was adjudged that the portion so set off to her should be charged with the excess in value, about \$900, in favor of the devisees of the remainder. The title to that portion not set apart to the widow vested in the appellees and other children and grandchildren of the testator by devise under the will. The widow was appointed and qualified as executrix of the will of her husband. She took the personal estate at its appraised value to apply on the \$500 due to her as widow, and canceled the remainder of the \$500 by crediting it upon the sum so charged against the real estate so set apart to her in the partition proceeding. The executrix filed

a claim in her own favor against said estate in a sum exceeding \$1,000 and interest, and procured its allowance, the amount allowed being some over \$1,500. She canceled the remainder of the sum charged against the real estate so set off to her by crediting it upon the claim so allowed in her favor, which left apparently due on her claim over \$1,100, and she assigned said claim to her son James, and James also filed a claim against said estate in his own favor for about \$2,000, which the executrix allowed. She obtained an order of court for the sale of the real estate of which the testator died seised, other than the portion set apart to her as aforesaid, and which was so devised to the appellees and others as hereinbefore stated, for the payment of the debts, there being but one claim filed against the estate other than those of herself and son James. In pursuance of such order she sold said real estate, and the same was purchased by her said son James; he paid no money on the amount for which he bid off the land, but paid the purchase price by receipting the amount bid on the claim so allowed to his mother, the executrix, and assigned to him, and the amount allowed in his favor. The sale was confirmed, and ¹⁵⁰ final settlement of said estate made, all the debts being paid except \$200 of the pretended claim of the executrix. All of which proceedings were had in the Marion circuit court. Afterwards James conveyed the land so purchased by him to his mother, the executrix. The appellees, who are the devisees and owners of the undivided one-half of said real estate so sold by said executrix, were, during all of the time from the death of the testator, nonresidents of the state, and all were under disability, some under disability of coverture, and others under disability of infancy.

The appellees brought this suit in the superior court of Marion county, alleging in their complaint the foregoing facts, and further alleging that the testator had been twice married, and by each marriage had children, one of the appellees being a daughter by the first wife, and the others children of another daughter by the first wife, and now deceased, and that James was a son by the last wife, the executrix, and lived with her.

It is further alleged that the executrix and her son James entered into a conspiracy to obtain all of the property of the testator, in pursuance of which conspiracy the claim was fraudulently caused to be allowed in favor of the executrix; that it was unjust, and nothing, in fact, was due to her; that

she assigned it to James for the purpose of having him purchase the real estate at the sale so to be made by her as executrix; and that he did purchase it, but that the purchase was in fact made for the executrix, and afterwards James conveyed the land to her; that the executrix has had possession of said real estate ever since the testator died, and received the use and rents and profits thereof, amounting to \$3,000. The prayer was to set aside the sale, and that the appellant Olivia Comegys be adjudged to hold the one-half of said real estate in trust for the appellees; that the title thereto ¹⁵¹ be quieted in them; that she be ordered to account to them for the one-half of the rent; that the pretended satisfaction of the amount charged against the land set apart to her be set aside, and the appellees be adjudged to have a lien on said land for the one-half of the amount; and there was a general prayer for all proper relief.

Issues were joined, and a trial was had in the superior court at special term, and there was a finding in favor of the appellants.

Appellees moved for a new trial as of right, which was refused, and appellees appealed to the general term, assigning as error the overruling of their motion for a new trial, and that the superior court had no jurisdiction of the subject matter of the action.

At general term the court reversed the judgment at special term, holding that the court erred in refusing a new trial as of right, and ordering a new trial, and from this judgment appellants appeal.

It is contended on behalf of the appellants that this is an attack upon the proceedings and judgment had and rendered in the circuit court, by which the claim in favor of the executrix was allowed, the sale of the real estate ordered, had, and confirmed, and the estate settled; and, furthermore, if the complaint bears any other construction, it must be held to state two causes of action: one to have a trust declared and the title to the one-half of the real estate quieted in the appellees, and the other to set aside the sale and orders and judgments of the circuit court; that if this, the latter construction, is given, and the superior court had jurisdiction of the subject matter of the action, having joined with the action to quiet title the action to set aside the sale and judgment, appellees are not entitled to a new trial as of right; that a new trial cannot be granted as of right, except they are entitled to a

new trial as to the whole case; and that by the ¹⁵² joinder of a cause of action, in which they are not entitled to a new trial, with the action to quiet title they are debarred of the right to a new trial as of right.

It must be admitted that, in view of the peculiarity of the complaint, there is much force in the contention of the appellants. The complaint was certainly not drafted on any very definite theory.

If the complaint is to be construed as an attack on the decree ordering the sale of the land, the sale and confirmation thereof, and the order allowing the claim in favor of the executrix, and seeking to set them aside, and reinstate their claim and lien upon the land set apart to the widow on account of fraud, then the action should have been brought in the court in which the original proceedings were had.

In speaking of the manner of setting aside judgments, this court, in the case of *Weiss v. Guérineau*, 109 Ind. 438 (444), says: "These methods, however, all contemplate proceedings in the case in which the unauthorized judgment is alleged to have been obtained." There may cases arise in which a court of equity would refuse to enforce or allow a defense to a judgment shown to have been obtained by fraud; but proceedings to set aside an executor's sale of real estate, and allowances made in the course of administration, must be brought in the court in which such proceedings were had.

A complaint must be construed according to its general scope and tenor, as appears from the averments, and the prayer will not control and determine its validity. When the trial court has placed a reasonable construction upon the averments of the complaint which might bear two constructions this court will be disposed to adhere to the construction which it received by the trial court.

The theory which must have been taken of the complaint ¹⁵³ in this case by the superior court in taking jurisdiction and trying the cause was, that it was a complaint to establish appellee's title to the real estate and to quiet the title to the same in them, on the theory that it charged fraud and collusion on the part of the executrix and her son James, and that the purchase was in fact made for the executrix by and through her son acting for her while she was still executrix; that the sale and conveyances did not vest title absolute in the appellant, Olivia Comegys, but that she took it in trust

for the appellees and other devisees and owners of the land before the sale.

As appears by a written opinion in the record, this was the construction and theory given to the complaint by the court in general term, and the averments having for their sole object the setting aside of the judgment and proceedings in the circuit court were treated as surplusage, being made in a complaint filed in a court having no jurisdiction in that behalf, they could have no effect, and would not be allowed to control or annul the averments which stated a good cause of action, of which the court had jurisdiction, and we think this a reasonable and proper construction to be given to the complaint.

With this construction given to the complaint, it leaves the action solely an action to establish and quiet title in the appellees. We have a line of decisions holding that a purchase of real estate by an executor or administrator at his own sale is void: See *Valentine v. Wysor*, 123 Ind. 47 (56), and authorities there cited.

In speaking of a purchase of real estate by an administrator, at a sale made on an execution in favor of the estate which he represented, this court, in *Murphy v. Teter*, 56 Ind. 545, says, the sale was not void, but voidable; that the purchaser must be regarded as a trustee, and that the *cestui que trust* might have the sale set aside, ¹⁵⁴ or let the sale stand and cause the trustee to convey the title to them, upon just and equitable terms. In *Valentine v. Wysor*, 123 Ind. 47, it is said that a sale by a trustee to himself is void, and authorities are cited in support of the statement. The same statement is made in other decisions. While this may be literally true where the record shows affirmatively a sale by the trustee, executor, or administrator to himself, yet we think where the record does not affirmatively show such fact, but, on the contrary, where the record shows, as averred in this case, that the sale was made to another who was not disqualified from purchasing, and the fact that the trustee was the real purchaser must be shown by proof *dehors* the record, the sale is not void, but voidable. In *Earle v. Earle*, 91 Ind. 27 (42), it is said: "The general and correct rule, as established by the weight of authority, is that a judgment by a court of competent jurisdiction is not void, unless the thing lacking, or making it so, is apparent upon the face of the record. If the infirmity do not so appear, the judgment is not

void, but voidable." If a sale be void, it may be treated as a nullity, and it is not necessary to set it aside by direct attack, it may be disregarded in collateral proceedings; but, if it be voidable only, it has full force and effect until set aside in proper proceedings, and cannot be attacked collaterally.

The facts in this case do not disclose but what all legal notices were given and all formalities of the law complied with in relation to the administration of the estate, the allowance of the claims, the ordering of the sale of the real estate, and in the making of the sale and confirmation thereof, and final settlement of the estate. It is well settled that parties and privies to proceedings cannot show their invalidity in collateral proceedings by bringing forward matter extraneous to the record itself: *Harman v. Moore*, 112 Ind. 221. There is no doubt that the heirs ¹⁵⁵ or devisees in this case might, in a proper proceeding, have had the sale set aside, on showing that the executrix was in fact the real purchaser at her own sale; that through collusion she had her son purchase for her, and reconvey the land to her after the sale was confirmed. As to whether or not the sale was valid depended upon the fact as to who was the purchaser. According to the averments of the complaint, the record shows the son James to have been the purchaser. If James was acting in collusion with his mother, and in fact made the purchase for her, that fact brought forward would have prevented the confirmation, but the sale is confirmed, and the record is regular and valid upon its face, showing a sale made by the executrix to one having the lawful right to purchase. The fact that after the confirmation James conveyed the land to his mother does not affect the validity of the sale, for if the sale was a valid one at the time it was made and confirmed, it would not be rendered illegal by reason of the fact that the purchaser afterwards conveyed the land to the executrix. We think such a sale voidable, and not void, and that while the devisees might have had the sale set aside on proper application and proof, yet they have the right, as against the executrix, to allow the sale to stand, and treat her as a trustee holding the land in trust for them, and maintain an action, and have the trust declared and their title to the land quieted upon just and equitable terms. Such is the relief sought in this case.

In 1 Perry on Trusts, 4th ed., section 224, it is said: "If an executor or administrator purchases indirectly of himself

through a third person, and takes a deed to himself through such third person, the sale will be void, or the estate will be held in trust by such administrator or executor for the heirs at law or other persons interested": See Perry on Trusts, sec. 225.

¹⁵⁶ The action being one to quiet title, the appellees were entitled to a new trial as of right. As we have said, the appellees could only have their title quieted on just and equitable terms, accounting to the executrix for what is due her, if any thing, but no question as to the basis of such accounting is presented to this court. The sole questions presented are such as we have considered.

There is no error in the record.

Judgment affirmed.

EXECUTORS AND ADMINISTRATORS.—PURCHASE BY AT THEIR SALE: See the notes to *Tillman v. Thomas*, 13 Am. St. Rep. 46; *Commercial etc. Assur. Co. v. Scammon*, 9 Am. St. Rep. 620, and *Dwight v. Blackman*, 57 Am. Dec. 136.

PENNSYLVANIA COMPANY v. CONGDON.

[134 INDIANA, 226.]

APPELLATE PRACTICE—SUFFICIENCY OF COMPLAINT.—All minor defects in a complaint, not challenged in the trial court, are cured by verdict, and the complaint must stand on appeal, unless it contains some fault affecting in a very material degree the cause of action, as the omission of a fact essential to its existence.

MASTER AND SERVANT—NEGLIGENCE—NECESSARY ALLEGATIONS AND PROOF. To enable an employee to recover from his employer on account of injuries received by reason of defective places, machinery, appliances, or incompetent co-employees it is generally necessary to allege and prove that the employer was in fault, and that the employee was without fault, or to allege and prove facts from which such fault and want of fault may be inferred.

PROXIMATE CAUSE is the efficient cause—the one that necessarily sets the other causes in operation. Causes that are merely incidental, or instruments of a superior or controlling agency, are not the proximate causes, though they may be nearer in time and more immediate to the result.

MASTER AND SERVANT—NEGLIGENCE—SUFFICIENCY OF COMPLAINT.—In an action by a brakeman against a railway company to recover for personal injuries caused by a defective lantern it must be alleged and proved that the defect was known to the company, or was such as, with reasonable diligence, it ought to have been known.

MASTER AND SERVANT—NEGLIGENCE—SUFFICIENCY OF COMPLAINT.—In an action by a brakeman against a railroad company to recover for injury caused by reason of a defective lantern furnished him by the company for his necessary use in the discharge of his duty, but kept in his cus-

tody, a complaint showing that the brakeman knew, or ought to have known, of the defect, and failing to allege that the company knew, or ought to have known, with the exercise of proper diligence, of the defect, is insufficient, notwithstanding a general allegation that the defect was unknown to the brakeman.

MASTER AND SERVANT—NEGLIGENCE—PRESUMPTION.—It will be presumed that a brakeman, eighteen years of age, who had been in the railroad service three months, had sufficient skill and experience to know that a lantern, constantly used by him, would go out because not properly guarded from the wind, so as to charge him with knowledge of its condition, and the duty to inform the company thereof.

Brackenridge, J. Morris, and A. Zollars, for the appellant.

L. M. Ninde and H. W. Ninde, for the appellee.

227 HOWARD, J. This was an action for damages, brought by appellee against appellant, resulting in a verdict and judgment for appellee.

The complaint is assailed for the first time in this court. The pertinent averments are the following:

“In June, 1888, when this plaintiff was an infant, eighteen years of age, said defendant employed him as an extra brakeman upon its train of freight-cars running upon said road, and on September 16, 1888, plaintiff was still continuing in said service for said defendant, and plaintiff was young and inexperienced in said business, and unable to appreciate and understand all the dangers and hazards of said business in which he was so engaged, which was well known to said defendant on said 16th of September, 1888; that on said 16th of September, 1888, said defendant required plaintiff to go upon a train of freight-cars on its said line of railroad from Fort Wayne to Chicago, and required plaintiff, upon said trip, to act as front brakeman on said train; that plaintiff, as requested and directed by defendant, did go upon said freight train, and, while the same was running from Fort Wayne to Wanatah, did act as front brakeman; that when said train arrived at Wanatah, and long before it arrived there, and long after it departed therefrom, it was night-time, and dark, and plaintiff was unable to perform his duties without the aid of a lantern to light his way, and plaintiff was, for some time before the receipt of the injury, as hereinafter **228** set forth, using a lantern provided for his use by said defendant, in lighting his way in discharging his said duties; that his duty as such brakeman required him

to use said lantern in making signals to other trainmen upon said train; that said train was equipped with air-brakes, by the use of which the engineer of said train could stop the same suddenly, and would so stop the same upon proper signal being given; that the lantern so furnished by defendant for plaintiff's use, and which he was then using, was defective, and not properly guarded from the wind, and would go out when properly used in making proper signals, which was unknown to plaintiff; that shortly after said train started west from Wanatah, and while plaintiff was upon said train, and on the top of a car thereof, in the proper discharge of his duty, he waved a signal with his said lantern, and the light in the same, by reason of its defective condition, went out, and plaintiff, not being able to light the same where he was, and being ignorant of the proper thing to do under the circumstances, and having received no instructions from said defendant as to the course he should pursue under such circumstances, and being unable to discharge his duties without such light, started to go to the engine of said train to relight said lantern; that as he reached the front end of said car, next to said engine, the engineer thereof, without warning or signal, put on the air-brakes upon said train and engine, suddenly slowing said train, whereby plaintiff was thrown forward, and between said car and the tender of said engine, and down upon the track of said railroad, and the wheels of said train passed over said plaintiff's arm, and crushed, bruised, and maimed the same, so that his said arm was necessarily amputated at the shoulder-joint, and he suffered great mental and physical anguish and pain, and was permanently injured, and was compelled to expend large sums of money in ²²⁹ medical attendance, nursing, and medicine, and was damaged in the sum of fifteen thousand dollars; that said injury was received, and said damages sustained, without any negligence whatsoever on the part of plaintiff; that defendant, well knowing the plaintiff's youth and inexperience, and inability to comprehend the dangers of his said employment, or to know what course to pursue, under the circumstances which resulted in said accident, so negligently put plaintiff in said position, place, and business, without any instructions given him as to what he should do under such circumstances, and without any caution or warning as to the dangers attendant upon such service, or the use of such air-brakes, and so negligently gave him such defective loco-

motive [lantern?] for use as aforesaid, by reason of which negligence said injuries were received and said damages sustained. Wherefore," etc.

This complaint was not challenged in the circuit court, so that all minor defects, if any, must be held to be cured by the verdict.

The complaint will stand, unless there is some fault in it which affects in a very material degree the cause of action: Elliott's Appellate Procedure, sec. 473, and cases cited in notes; Buskirk's Practice, and cases cited.

In *McGregor v. Hubbs*, 125 Ind. 487, it is said that "an assignment of error that the complaint does not state facts sufficient to constitute a cause of action is not available for the reversal of the judgment unless some fact essential to the existence of the cause has been wholly omitted from the complaint."

To enable an employee to recover damages from his employer, on account of injuries received by reason of defective places, machinery, or appliances, or incompetent co-employees, furnished by the employer for the use or assistance of the employee, it is necessary, in general, ²³⁰ to allege and prove that the employer was in fault, and that the employee was without fault; or, at least, to allege and prove facts from which such fault and want of fault may be inferred.

In this case it is therefore essential that the averments of the complaint should show that any defects alleged to exist in the management of appellant's train, or in the character or quality of the appliances used in connection with the running of the train, from which the accident resulted, were due to the negligence or carelessness of appellant, and that appellee was himself free from such negligence or carelessness.

It may be necessary to say something of the real cause of the accident as disclosed in the complaint, and to distinguish the cause of the accident from the incident or occasion connected with it. Webster defines an occasion, as distinguished from a cause, to be "that which incidentally brings to pass an event, without being its efficient cause or sufficient reason."

While the cause to be considered must be the proximate, and not the remote, cause, "yet the question is not what cause was nearest in time or place to the catastrophe."

In *Insurance Co. v. Boon*, 95 U. S. 117, the proximate cause is defined to be "the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely

incidental, or instruments of a superior or controlling agency, are not the proximate causes and the responsible ones, though they may be nearer in time to the result." And the court continues: "If two causes conspire, and one must be chosen, the more scientific inquiry seems to be whether one is not the efficient cause, and the other merely instrumental or merely incidental, and not which is nearer in place or time to the consummation of the catastrophe. . . . In *Gordon v. Rimmington*, ²³¹ 1 Camp. 123 (cited in Phillips on Insurance, sec. 1097), it was held that when the captain of a ship insured against fire burned her to prevent her falling into the hands of the enemy, it was a loss by fire within the meaning of the policy. It was because the fire was caused by the public enemy. The act of the captain was the nearest cause in time, but the danger of capture by the public enemy was regarded as the dominating cause. . . . In *Lund v. Tyngsboro*, 11 Cush. 563, 59 Am. Dec. 159, where it appeared that a traveler had been injured by leaping from his carriage, exercising ordinary care and prudence, in consequence of a near approach to a defect in a highway, the town was held liable, though the carriage did not come to the defect. The defect was regarded as the actual, the dominating, cause. . . . In *Insurance Co. v. Tweed*, 7 Wall. 44, it was, in effect, ruled that the efficient cause, the one that set others in motion, is the cause to which the loss is to be attributed, though the other causes may follow it and operate more immediately in producing the disaster."

So it has been frequently held that a railroad company is liable for injury to land by fire caused by its negligence; although the fire did not come directly from the railroad, but from land belonging to another owner and lying intermediate between the railroad and the plaintiff's land; the negligence of the company in such case being considered not the remote, but the proximate, cause of the injury: *Delaware etc. R. R. Co. v. Salmon*, 39 N. J. L. 299; 23 Am. Rep. 214; *Clemens v. Hannibal etc. R. R. Co.*, 53 Mo. 366; 14 Am. Rep. 460; *Atchison etc. R. R. Co. v. Stanford*, 12 Kan. 354; 15 Am. Rep. 362; *Poeppers v. Missouri etc. Ry. Co.*, 67 Mo. 715; 29 Am. Rep. 518.

In the carefully considered case of *Billman v. Indianapolis etc. R. R. Co.*, 76 Ind. 166, 40 Am. Rep. 230, ²³² where a team of horses was frightened by a railroad engine and ran against another horse and killed it, it was contended that the killing of the horse, being done by the runaway team, the negligence

of the railroad company was too remote a cause; but the court held that the injury was not so remote from the original wrong as to defeat the right to recover for the damages flowing from the injury, and that the wrong done by the railroad company "set in motion the cause which produced the injury": See *Lee v. Union R. R. Co.*, 12 R. I. 383; 34 Am. Rep. 668. Also note in case of *Brown v. Chicago etc. Ry. Co.*, 54 Wis. 342; 41 Am. Rep. 41.

In the case now before the court, while the sudden stopping of the train by the air-brakes was undoubtedly the immediate occasion of the accident, yet the real cause reached back to the going out of the lantern. The chain of circumstances, from the failure of the light in the lantern to the fall of appellee upon the track and under the wheels, was complete and single, all the particulars resulting immediately from the defective lantern.

The real cause, in order to be within the issues tendered in the complaint, must be one involving fault on the part of the appellant or appellee, or of both; for the cause of the accident, to have connection with the litigation, must have relation to the negligence of the parties. If there is no negligence, there is no cause of action. But it cannot be said that the sudden stopping of the train by the air-brakes was such cause. Air-brakes are a proper and useful attachment to a train of cars; and one of the proper uses of such air-brakes is to stop the cars suddenly, as was done in this instance. And it is not charged that the putting on of the air-brakes was done without necessity, or that the action of the engineer in putting them on was in any respect negligent or showed any want of due care.

233 On the other hand, it will hardly be claimed that appellee's duty, when his lantern went out, was to remain where he was in the dark. His duty required him to relight his lantern with as little delay as possible. He was front brakeman; a light was necessary for the discharge of his duties, and it is apparent that the readiest means of relighting his lantern was to go to the engine, next to which his car was. This act not only does not seem to have been negligent, but seems to have been the proper and necessary thing for him to do.

The cause of the accident, therefore, so far as fault or negligence on the part of either appellant or appellee is concerned, must be that which preceded, and directly brought on and set

in motion, the intermediate series of incidents which ended in appellee's being thrown under the wheels of the cars.

The complaint alleges that the lantern furnished by appellant for appellee's use was defective and not properly guarded from the wind, and would go out when properly used in making proper signals; and it is averred that this defect was unknown to appellee. But it is not alleged that such defect was known to appellant. On the contrary, the fact that appellee had the sole use and care of the lantern, and this "for some time before the receipt of the injury," as stated in the complaint, presumably during the whole three months of his service as brakeman, would seem to indicate that if any one could know its defective condition it must be the appellee himself. The general statement in the complaint, that the defect in the lantern was unknown to appellee, would not be enough if it should appear from other allegations that he did, in fact, or ought to, have knowledge of such defect. And if there were no allegations from which it might be inferred that either appellant or appellee knew, ²³⁴ or could know, of the defect, then the defect would be one of those for which neither would be chargeable; for, in case the defect was latent and unknown either to the employer or the employee, and could not be discovered by either, then neither could be held to be in fault.

In *Mad River etc. R. R. Co. v. Barber*, 5 Ohio St. 541, 67 Am. Dec. 312, it was held that a railroad company is not liable to a conductor for injury caused by defects in machinery or running apparatus of a train which is in his charge and under his control, where defects were unknown to both parties, and neither party was in fault. And while the company was required and was presumed to use all reasonable and ordinary care in the management of its business, and in supplying safe cars and appliances and competent co-employees, yet the conductor, in taking charge of the train, assumed the risks and hazards of the business.

In *Nashville etc. R. R. Co. v. Elliott*, 1 Cold. 611, 78 Am. Dec. 506, it was held that an employee who voluntarily engages to serve a railroad company is presumed to know that there are extraordinary dangers inseparable from such service, which human care and foresight cannot guard against, and that he therefore undertakes to run all the ordinary risks of his employment.

Wharton lays it down as a rule that "an employee who,

after having the opportunity of becoming acquainted with the risks of his situation, accepts them, cannot recover for injuries thereby received." The risks which he thus assumes are the ordinary and natural risks incident to his employment, or which, from the facts before him, it was his duty to infer. And the fact that he had obtained knowledge of such risks may be deduced from the circumstances of the case: Wharton on Negligence, sec. 214. See, ²³⁵ also, *Indiana etc. Ry. Co. v. Snyder* (Ind., Jan. 28, 1893), 32 N. E. Rep. 1129, and *Evansville etc. R. R. Co. v. Duel*, 134 Ind. 156, both decided at this term, and in which numerous authorities are cited.

In this case appellee, as appears from his complaint, had sole care and custody of the defective lantern, and it does not appear that at any time he reported any defect in it to the company; indeed, the complaint states that appellee himself did not know of such defect, yet he had been engaged as brakeman for about three months; and the complaint states that "plaintiff was for some time before the receipt of the injury . . . using a lantern provided for his use by said defendant; . . . that the lantern so furnished by defendant for plaintiff's use, and which he was then using, was defective and not properly guarded from the wind, and would go out when properly used in making proper signals, which was unknown to plaintiff."

It is not said that appellant knew, or was informed, of this defect; nor are any facts stated going to show that appellant had any means of learning of the defect. The lantern was given to appellee for his own use, and, for all that appears in the complaint, it was at all times in his care, and appellant knew, and could know, nothing of its condition. How appellee could be ignorant of the condition of his lantern, or how appellant could have knowledge of it, except through appellee, in whose care it was, does not appear from the complaint.

Of course, the appellant was required to use proper care in furnishing safe appliances, including a suitable lantern, but that did not relieve appellee from the exercise of due care.

The appellant company could only inspect and test the condition of the lantern by the agency of some employee. The brakeman, appellee, was such an employee, and apparently ²³⁶ the only one at the time having charge of the lantern, as he had had for some time previous, and his failure to discover any defect and report it to appellant cannot be ascribed as negligence in the company, so far as he is him-

self concerned: *Ballou v. Chicago etc. Ry. Co.*, 54 Wis. 257; 41 Am. Rep. 31, and note.

In *Illinois Cent. R. R. Co. v. Jewell*, 46 Ill. 99, 92 Am. Dec. 240, where a brakeman was thrown from a railroad car and killed, by reason of the brakehead coming off the upright shaft, because of the nut at the top having become loose and coming off, it was held that the company was not liable, as it was the brakeman's duty to see that the brake, of which he had charge himself, was in good repair and fit condition for use, and to report its defects, if any, to the company.

In *Ballou v. Chicago etc. Ry. Co.*, 54 Wis. 257, 41 Am. Rep. 31, the following rule is quoted with approval, as one the fairness of which cannot well be questioned: "An employee cannot recover for an injury suffered in the course of his employment from a defect in the machinery used by his employer, unless the employer knew, or ought to have known, of the defect, and the employee did not know of it, or had not equal means of knowledge": See, also, *Pittsburgh etc. Ry. Co. v. Adams*, 105 Ind. 151 (163); *Indiana etc. Ry. Co. v. Dailey*, 110 Ind. 75 (81); *Lake Shore etc. Ry. Co. v. Stupak*, 108 Ind. 1.

The complaint neither alleges knowledge on the part of appellant of any defect in the lantern, nor does it allege facts from which such knowledge on the part of appellant may be inferred. On the other hand, while it is alleged that appellee had no knowledge of the defect in the lantern, facts are stated which would seem to indicate that appellee ought to have known of the defect, if any existed.

Much is said in the complaint of the infancy and inexperience ²³⁷ of appellee, and of appellant's knowledge of such infancy and inexperience.

Appellee was eighteen years of age; he seems to have been a competent brakeman; he was retained in his employment from June 18th to September 16th, the date of the accident. The skill and experience required in trimming and caring for a lantern, and knowing whether it would go out or not, do not seem to be inconsistent with the abilities and age of such a person as appellee appears to have been.

Appellee refers to *Cleveland etc. Ry. Co. v. Wynant*, 100 Ind. 160, and *Pittsburgh etc. Ry. Co. v. Adams*, 105 Ind. 151, in support of his contention that a charge of negligence includes knowledge as an essential element of negligence. It is not clear that there is any sufficient allegation of negligence as to the lantern made against appellant in appellee's complaint.

The strongest statement in that regard is an imperfect recital rather than a distinct allegation. But whether, in the absence of a demurrer or a motion to make more specific, the weakness of the complaint in this particular is cured by the verdict we need not inquire, for, even if such charge were well made, we do not think that the authorities referred to would bear out appellee's contention.

At page 155 of the latter case it is said: "Upon the hypothesis that the *gravamen* of the action is alone the negligence of appellant in connection with the rail, and that to constitute negligence in that regard it is essential that appellant knew, or with reasonable care might have known, of its unsafe condition, still, the general averment that appellant negligently left the sliver or splint projecting from the rail is sufficient." That is a correct statement of law. But the *gravamen* of the action in the case before us is not alone the negligence of appellant in connection with the lantern, but there is added **238** to this the question of the relation of employer and employee, and the assumption of care by the former and of hazard by the latter. And, in the same case, at page 163, we find the more specific rule that "if the servant claims damages from the master for injuries received on account of defective premises, buildings, machinery, or appliances, he must allege and prove that the unfitness, or the defect, which caused the injury, was known to the master, or was such as, with reasonable diligence and attention to his business, he ought to have known." This rule applies to the case we are considering.

It seems very clear that the complaint does not state a good cause of action.

The judgment is reversed, with instructions to grant a new trial.

MASTER AND SERVANT—NECESSITY FOR PLEADING MASTER'S NEGLIGENCE.—To entitle a servant to recover for an injury he must prove negligence or omission of duty on the part of the master occasioning the injury: *Wormell v. Maine Cent. R. R. Co.*, 79 Me. 397; 1 Am. St. Rep. 321; *Cole v. Chicago etc. Ry. Co.*, 71 Wis. 114; 5 Am. St. Rep. 201.

NEGLECTANCE—PROXIMATE CAUSE.—WHAT IS: See the extended note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 807-809.

MASTER AND SERVANT.—RISK OF DANGEROUS APPLIANCES is assumed where there is ample means on the part of a servant for knowing the defects thereof: *Darracott v. Chesapeake etc. R. R. Co.*, 83 Va. 288; 5 Am. St. Rep. 266, and note. An employer is not responsible to a servant for an injury received in his employment, resulting from those dangers which are

the subject of common knowledge, or which can be seen by common observation: *Smith v. Peninsular Car Works*, 30 Mich. 501; 1 Am. St. Rep. 542, and extended note at page 550. An employer is under no obligation to warn an employee of danger which is obvious, nor instruct him in matters which he may fairly be supposed to understand: *Ciriack v. Merchants' Woolen Co.*, 151 Mass. 152; 21 Am. St. Rep. 438. See, also, the extended note to *Shortel v. St. Joseph*, 24 Am. St. Rep. 322, and the note to *Ciriack v. Merchants' Woolen Co.*, 4 Am. St. Rep. 311.

FARIS v. HOBERG.

[134 INDIANA, 269.]

NEGLIGENCE—WHAT CONSTITUTES.—To constitute actionable negligence a duty must exist on the part of the defendant to protect the plaintiff from the injury of which he complains, coupled with a failure to perform that duty, and an injury to the plaintiff arising from such failure.

NEGLIGENCE—DIRECTING VERDICT.—If a party alleging negligence fails to establish by proof all of the elements necessary to constitute it, the court may instruct the jury to return a verdict for the defendant, as when there is no conflict in the evidence or a total failure of proof as to an essential element of the negligence.

LICENSEES—DUTY OF OWNER OF PREMISES.—The owner of premises is under no legal duty to keep them free from pitfalls or obstructions for the accommodation of persons who go upon or over them without invitation, express or implied, and merely for their own convenience or pleasure, even when this is done with the owner's permission. Such visitors are mere licensees, and enjoy the license subject to the attendant risks.

LICENSEE—RISKS ACCEPTED BY.—A person who visits a portion of a store not frequented by visitors, entirely on his own business, without the owner's invitation or knowledge, is a mere licensee, and cannot recover for an injury received in falling down an open elevator-shaft on that part of the premises.

I. N. Pierce, J. G. McNutt, and S. R. Hamill, for the appellant.

S. B. Davis, J. C. Robinson, and G. M. Davis, for the appellees.

270 HACKNEY, J. The appellant prosecuted this action in the court below for the recovery of damages in the sum of twenty thousand dollars, alleged to have been sustained by falling into an open elevator-shaft upon the premises of the appellees. The issue was joined by a general denial, and, in the submission of the cause, the court instructed the jury to return a verdict in favor of the appellees. This action of the court is here submitted for review.

The appellees were retail merchants in the city of Terre

Haute, their storehouse fronting on Wabash avenue, and extending north one hundred and forty-one feet and ten inches, with an alley on the west, sixteen feet in width. In the northwest corner of the building, on the first floor, was a freightroom extending north and south eighteen feet and eleven inches, and being seven feet and eleven inches in width. To this room double doors opened from said alley, and immediately south of this room was the shaft of the freight elevator (where the injury was sustained), occupying the full width of said freightroom. Immediately south of the elevator was a vestibule entrance to the storeroom. To the elevator-shaft was an entrance, on the south, of four feet in width by seven feet in height, and a like entrance from the freightroom, four feet and nine inches wide, and directly opposite the entrance from the salesroom. The vestibule entrance to the salesroom opened immediately south of the west side of the salesroom entrance to the freight elevator, and from this entrance one could pass behind a drygoods counter, on the right, into ²⁷¹ the elevator-shaft at the left, or around a large table laden with goods and through a narrow opening between said table and said counter to that part of the salesroom devoted to the walks for customers between the counters.

On the alley, and next to the storehouse, was a walk of stone flagging, thirty inches wide, sixty-eight feet and ten inches long, and extending north from Wabash avenue. From the north end of this walk to the vestibule entrance it was forty feet and two inches, without paving.

On the occasion of appellant's visit to appellees' storeroom he was seeking a drayman to haul some of his goods, not connected with appellees' business, and learning that John Burns, the owner of a transfer wagon, was in the rear of appellees' store, went to the alley and saw the wagon at the entrance to the freightroom. Going up the alley, he could not see Burns, and presuming that he was in the building stepped in at the vestibule entrance. He immediately turned, facing the two openings to the elevator-shaft, and, seeing some person in the freightroom, asked for the drayman, and received an answer from the freightroom that he was in there. At once appellant started into the freightroom through said openings, and fell through the shaft, neither of the openings to which was guarded or protected by barriers.

All of the foregoing facts are undisputed.

There are some controverted facts as to the character of lights near the shaft, and as to the extent of the darkness within the shaft, facts, from the appellant's theory of the case, essential to the charge of negligence against the appellees. There were also controverted facts as to appellant's vision having been so obscured by the sudden change from the bright sunlight without, and the softer lights and the shadows within the building, and probably as to other matters, but all having reference to ²⁷² the question of contributory negligence on the part of the appellant.

Numerous authorities are cited by the appellant, to the proposition that in a case involving questions of negligence the court is not at liberty to take such questions from the jury, but must leave them to the jury for decision. Of the cases so cited are *Indiana Car Co. v. Parker*, 100 Ind. 181; *Koerner v. State*, 98 Ind. 7; *Weis v. City of Madison*, 75 Ind. 241; 39 Am. Rep. 135; *Crookshank v. Kellogg*, 8 Blackf. 256; and *Elliott's Work of the Advocate*, 686.

These cases all belong to that class where a question of fact is controverted, and that question is one necessary to plaintiff's recovery, or essential to the defendant's proper defense. None of them hold that the jury are the exclusive judges of the existence or nonexistence of negligence as an ultimate fact. A moment's reflection will show the error of a rule which would deprive the court of the right to determine whether a given state of facts—uncontroverted—does or does not constitute actionable negligence. When the facts are submitted to the court upon demurrer to a complaint, the court exercises the power of determining whether such facts, if proven, will constitute actionable negligence. When, under the practice prevailing, the jury does not return a general verdict, but returns findings of fact by special verdict, the court must determine whether the facts so found are sufficient to warrant the conclusion of the existence of negligence. When, during the trial, the court is called upon to instruct the jury, there is, that we now recall, but one limitation upon the duty to charge that a given state of facts, if found by the jury to exist, does or does not authorize the finding of negligence, and that exception is where the facts, clearly established, are such that one man, impartial and of good judgment, might reasonably infer that negligence existed, while another man, equally ²⁷³ sensible and impartial, might reasonably infer that proper care had been used. Upon such facts it is the

province of the jury to adjudge the existence or nonexistence of negligence: *Ohio etc. Ry. Co. v. Collarn*, 73 Ind. 261; 38 Am. Rep. 134. The case in hand is not of that class. If it were otherwise the purpose of the charge to the jury would be thwarted, and that which is designed for the instruction of the jury upon matters of law, where it is supposed the members have not the special knowledge possessed by the judge, would be but a useless ceremony, and the jury would be given the arbitrary and uncontrolled power to determine what facts, however important or however trivial, should constitute actionable negligence. In the progress of the trial the court determines the admissibility of evidence as having or as not having a tendency to prove negligence, and it may not be said that in so doing the functions of the jury are usurped by the court.

Some of the authorities cited expressly recognize the existence of cases where the court may take the question from the jury.

In *Weis v. City of Madison*, 75 Ind. 254, 39 Am. Rep. 135, it is said: "There are cases where the court may rightfully direct a verdict. A judge is not bound to submit a question to a jury, where their verdict, if contrary to his views of the testimony and its legal effect, would be certainly set aside, as clearly against the law and the evidence: *Dryden v. Britton*, 19 Wis. 31; *Godin v. Bank etc.*, 6 Duer, 76; *Lane v. Old Colony etc. R. R. Co.*, 14 Gray, 143; *Improvement Co. v. Munson*, 14 Wall. 442; *Jewell v. Parr*, 13 Com. B. 909; *Parks v. Ross*, 11 How. 362; *Pleasants v. Fant*, 22 Wall. 116; *Dodge v. Gaylord*, 53 Ind. 365 (377)."

In *Indiana Car Co. v. Parker*, 100 Ind. 181, it is said: "There are, no doubt, cases where the court will determine the ²⁷⁴ question of contributory negligence, but this is not one of them." The opinion then proceeds in setting forth the facts in dispute, which facts were there held to be essential to a conclusion of negligence.

The case of *Koerner v. State*, 98 Ind. 7, holds that the court has not the right, in charging the jury, to assume the existence of some essential fact. But it is said "where the existence of a fact is established without any conflict, contradiction or dispute" it is not error to assume the existence of such fact.

In the *Work of the Advocate*, 686, Judge Elliott says: "Where the plaintiff wholly fails to make out a case the

defendant is entitled to an instruction directing the jury to return a verdict in his favor. If the evidence of the defendant entirely answers and overthrows that of the plaintiff, not leaving him a *prima facie* case, the former is entitled to an instruction requiring the jury to give him the verdict. On the other hand, if the defendant's evidence wholly fails to meet that of the plaintiff, or to establish any affirmative defense, it is the plaintiff's right to have the jury so instructed. Neither party is, however, entitled to such an instruction where there is a conflict of evidence upon a material point."

Is this a case where, under the rules quoted from the authorities cited by the appellee, the court had the right to direct a verdict for the defendant?

In every case involving actionable negligence there are necessarily three elements essential to its existence: 1. The existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains; 2. A failure by the defendant to perform that duty; and, 3. An injury to the plaintiff from such failure of the defendant.

When these elements are brought together they unitedly constitute actionable negligence. The absence ²⁷⁵ of any one of these elements renders a complaint bad or the evidence insufficient.

As a question of evidence, the facts are given to the jury, and if there is no evidence whatever as to one of the three elements, then, as a question of law, the plaintiff has failed, and the court may direct a verdict for the defendant. Or, if there has been evidence as to one of the three elements, and that evidence is not conflicting, but is free from dispute, the jury has no office to perform in reconciling a conflict, and if left to return a verdict, and it should be for the plaintiff, the court would, if the unconflicting evidence of that one element was not sufficient to establish the element, set aside the verdict as not supported by the evidence. If, before the retirement of the jury, the court shall see that the evidence, so without dispute, is insufficient to prove the one element to which it is addressed, the court may direct the verdict, because a finding for the plaintiff would not be supported by the evidence.

If this case is with the appellees it must be because the appellant failed to establish one of the elements essential to the conclusion of actionable negligence, by evidence free from such conflict, as required the jury to weigh it and adjust the

differences between witnesses, or because, giving the whole evidence the most favorable construction, and the most favorable, yet reasonable, inferences in his behalf, it fails to establish the element in question: *Mann v. Belt R. R. etc. Co.*, 128 Ind. 138; *Louisville etc. Ry. Co. v. Schmidt*, 134 Ind. 16, and cases therein cited.

Taking the undisputed facts as we have stated them, and according to them all reasonable inferences in appellant's favor, the first inquiry naturally suggesting itself is, Did the appellees owe to the appellant a duty to protect him from the dangers of the open elevator-shaft? ²⁷⁶ In the *Evansville etc. R. R. Co. v. Griffin*, 100 Ind. 221, 50 Am. Rep. 783, it was held that "the owner of premises is under no legal duty to keep them free from pitfalls or obstructions for the accommodation of persons who go upon or over them merely for their own convenience or pleasure, even where this is done with his permission. In such case the licensee goes there at his own risk, and, as has often before been said, enjoys the license with its concomitant perils."

Again, in *Thiele v. McManus*, 3 Ind. App. 132, it is said: "A complaint for personal injury through negligence must show a legal duty or obligation of the defendant toward the person injured, existing at the time and place of the injury, which the defendant failed to perform or fulfill; and that the injury was occasioned by such failure: *Sweeney v. Old Colony etc. R. R. Co.*, 10 Allen, 368; 87 Am. Dec. 644; *Evansville etc. R. R. Co. v. Griffin*, 100 Ind. 221; 50 Am. Rep. 783; *City of Indianapolis v. Emmelman*, 108 Ind. 530; 58 Am. Rep. 65. Such a duty arises out of some relation existing at the time between the person injured and the defendant, which the complaint, by the averment of facts, should show. The owner or occupant of premises is not under any legal duty to keep them free or safe from the danger of obstructions, pitfalls, excavations, trapdoors, or openings in floors for persons who go upon, into, or through the premises, not by his invitation, express or implied, but for their own pleasure or convenience, though by his acquiescence or permission, and who, therefore, are mere licensees. Such a visitor enjoys the license subject to the attendant risks: *Evansville etc. R. R. Co. v. Griffin*, 100 Ind. 221; 50 Am. Rep. 783; *City of Indianapolis v. Emmelman*, 108 Ind. 530; 58 Am. Rep. 65; *Sisk v. Crump*, 112 Ind. 504; 2 Am. St. Rep. 213; *Indiana etc. Ry. Co. v. Barnhart*, 115 Ind. 299; *Penso v. McCormick*, 125 Ind. 116;

21 Am. St. Rep. 211; *Schmidt v. Bauer*, 80 Cal. 565; *Holmes v. Northeastern Ry. Co.*, L. R. 4 Ex. 255; *Mathews v. Bensel*, 51 N. J. L. 30."

²⁷⁷ The case before the appellate court was a stronger case for the injured plaintiff than is the case now before this court. It was shown that the plaintiff fell through a hatchway located in that part of the storeroom used as a walkway, and where the customers of the defendant would and did naturally go in trading and inspecting their goods. It is not shown that the plaintiff was one of the class of persons invited to visit the premises, though it is alleged in the complaint that she was "properly and necessarily in said building, without fault on her part." Of this the court said: "If this be considered sufficient to show that the appellee was not a trespasser, it cannot be regarded as showing that she was in the place of danger, by the invitation of the appellants, or as showing more than that she was a mere licensee."

We regard the case just quoted as stronger than the case before us, for the reason that the hatchway through which the injury was sustained was located in the walkways provided for customers, and not, as in this case, behind a counter, and as a connection between the room to which customers were invited and a freightroom, to which there is no evidence and no reasonable inference that the appellant was invited. It is not a natural inference that an invitation, express or implied, to visit the store as a customer carried with it the privilege of entering the store from an alley, and of going into a freightroom separated by walls and cut off from the salesroom by the freight elevator. There is no claim that there was an express invitation to appellant to visit the store, to enter through the alley, or to go into the freightroom. There is no reason to infer from any evidence in the cause, or from any claim of counsel for appellant, that he could any more presume upon the right of a customer ²⁷⁸ in going into the freightroom than into the private office or behind the sales-counter of the appellees.

An injury sustained from defective machinery, by one visiting a coal-shaft to secure employment, was held to create no liability, the visitor being only a licensee: *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391; 54 Am. Rep. 718.

In *Converse v. Walker*, 30 Hun, 596, it was held, that one who took refuge in a hotel to escape a thunder-storm, and was

injured by a defective balcony, was but a licensee, and could not recover.

Bedell v. Berkey, 76 Mich. 435, 15 Am. St. Rep. 370, was an action for an injury sustained in falling into an elevator-shaft upon the defendant's premises, a storeroom, and it was held that although the plaintiff visited the store on business, if he strayed about over the premises at his own will, peering into dark recesses, he was bound to look out for his own safety.

The case of *Trask v. Shotwell*, 41 Minn. 66, is one in most respects like the case under consideration, but, in the one respect of the injured person having business upon the premises in connection with the proprietors, much stronger than this case. The plaintiff bought goods of a wholesale firm, and sent his nephew after them; when the messenger arrived he was directed to the alley-door of the shipping-room, and, arriving there, knocked, and the door was opened; he then gave directions to the teamster, closed the door, and walked into the building, and, passing about, fell into the elevator-shaft and sustained injuries from which he died. It was held that the defendants owed no duty to the deceased to keep the freight elevator guarded, and that the court did not err in directing a verdict for the defendants.

In *Indiana etc. Ry. Co. v. Barnhart*, 115 Ind. 399, it is said by this court: "Where a person has a license to go ²⁷⁹ upon the grounds or the inclosure of another, he takes the premises as he finds them, and accepts whatever perils he incurs in the use of such license. But when the owner or occupant, by enticement, allurement, or inducement, whether express or implied, causes another to come upon his lands he then assumes the obligation of providing for the safety and protection of the person so coming, and for any breach of duty in that respect, such owner or occupant becomes liable for any injury which may result to the person so caused to come on to his lands. The enticement, allurement, or inducement, as the case may be, must be the equivalent of an express or implied invitation. Mere acquiescence in the use of one's lands by another is not sufficient." Many authorities will be found cited by the court in support of the propositions we have quoted.

In the case in review there is no claim of an express invitation, and we cannot imply an invitation to the appellant to there search for a drayman, from the mere fact that appellees

were engaged as merchants, with their doors thrown open to purchasers, or, possibly to those who go

"From shop to shop
Wandering, and littering with unfolded silks
The polished counters."

Judge Charles A. Ray, formerly of this court, in his excellent work on the Negligence of Imposed Duties, pages 18 and 19, says: "The keeper of a public place of business is bound to keep his premises, and the passageways to and from them, in safe condition, and use ordinary care to avoid accidents or injury to those properly entering upon his premises on business. But this rule only applies to such parts of the building as are a part of, or used to gain access to, or constitute a passageway to and from the business portion of the building, and not to ²⁸⁰ such parts of the building as are used for the private purposes of the owner, unless the party injured has been induced by invitation or allurement of the owner, express or implied, to enter therein."

In *Bennett v. Railroad Co.*, 102 U. S. 577, it is said, on page 584: "It is sometimes difficult to determine whether the circumstances make a case of invitation, in the technical sense of that word, as used in a large number of adjudged cases, or only a case of mere license. 'The principle,' says Mr. Campbell, in his treatise on Negligence, 'appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it.'" While this case is cited with approval in *Indiana etc. Ry. Co. v. Barnhart*, 115 Ind. 399, we need not fully approve this distinction, for here the appellant went upon the premises on business wholly his own; his entrance was through an unusual passage; the injury was sustained while entering a part of appellees' premises not shown to have been frequented by customers or visitors, and his presence is not shown to have been known to, or observed by, appellees. Nor is it necessary for us to hold, as appellees insist, that appellant was a trespasser. If only a licensee, the rule, properly applied, precludes recovery.

We find no error in the direction of a verdict for the appellees, and the judgment of the lower court is affirmed.

NEGLECT—WHAT CONSTITUTES. —Actionable negligence grows only out of a want of ordinary care and skill in respect to a person to whom the defendant is under obligation or duty to exercise such care and skill: *Gibson*

v. *Leonard*, 143 Ill. 182; 36 Am. St. Rep. 376, and note with the cases collected.

TRIAL.—DIRECTING VERDICT: See *Callett v. Railway Co.*, 57 Ark. 461; 38 Am. St. Rep. 254; and *Woolwine v. Chesapeake etc. Ry Co.*, 36 W. Va. 329; 32 Am. St. Rep. 859, and note with the cases collected.

REAL PROPERTY—LICENSEES—RISKS ASSUMED BY, AND DUTY OF OWNER OF PREMISES TO.—The owner of lands and buildings assumes no duty to one who is on his premises by permission only as a mere licensee, except that he will refrain from willful or affirmatively injurious acts: *Gibson v. Leonard*, 143 Ill. 182; 36 Am. St. Rep. 376. This subject is thoroughly discussed in *Plummer v. Dill*, 156 Mass. 426; 32 Am. St. Rep. 463, and the monographic note thereto.

COHEE v. BAER.

[134 INDIANA, 375.]

JUDGMENTS AGAINST INFANTS—COLLATERAL ATTACK.—A judgment taken against an infant served with process and represented by attorney, though without the appointment of a guardian *ad litem*, is valid, and not subject to collateral attack.

JUDGMENTS AGAINST INFANTS erroneous, but not void, are not subject to collateral attack.

JUDGMENTS AGAINST INFANTS—COLLATERAL ATTACK.—If the invalidity of a judgment against an infant is sought to be shown by bringing forward matter extraneous to the record this is a collateral attack, and cannot be made by a party to the judgment.

JUDGMENTS AGAINST INFANTS—CONCLUSIVENESS OF—COLLATERAL ATTACK. The failure of a minor to interpose the plea of infancy in an action against him constitutes a waiver of such plea, and the judgment is as binding upon him as if he had been of full age at the date of its rendition, nor is such judgment subject to collateral attack predicated upon matter *dehors* the record.

J. V. Kent and R. W. Irwin, for the appellant.

T. H. Palmer and W. F. Palmer, for the appellees.

375 OLDS, J. The questions presented in this case arise on the rulings of the court in the sustaining of the demurrers to the second amended complaint, and to the appellant's answer to the cross-complaint.

The complaint alleges that appellant is now, and for five years last past has been, the owner in fee simple of certain real estate, describing it; that she so owned the same on and prior to the twenty-sixth day of May, 1886; that on said date, and until the twentieth day of December, 1889, she was an infant, being under twenty-one years of age; that she did not arrive at the age of twenty-one years until the date last afore-

said; that on and prior to the twenty-sixth day of May, 1886, and continually, until the twenty-seventh day of July, 1888, she was a married woman, being the wife of one Charles Slipher; that, on the twenty-fourth day of August, ³⁷⁶ 1886, and while she and her then husband were yet infants, John Baer, then in life, but now deceased, filed his complaint, and brought his action in the Clinton circuit court against the appellant and her then husband, alleging therein, among other things, that the appellant had, prior to said date, entered into a contract with him (said Baer), for the erection and repair of a certain dwelling-house upon the real estate aforesaid, and for certain material furnished and used therein; that afterward, at the September term, 1886, of the said Clinton circuit court, such proceedings were had in said court that said Baer recovered a judgment against the appellant and her husband for the sum of sixty-five dollars and costs, and fifteen dollars attorney's fees, and also the foreclosure of a mechanic's lien for the sum aforesaid, and a decree of said court ordering and directing the sale of said real estate to make said sum of money and costs.

It further alleges a sale on said decree to said appellee Slipher, and the execution of a certificate and deed in pursuance thereof; that appellee Slipher took possession under the deed, and has ever since held possession of the same, claiming to be the owner in pursuance of said deed, and does not hold, or claim to hold or own, by any other or different title; that on the — day of —, 18—, John D. Baer departed this life at said county, intestate, leaving surviving him appellee Caroline Baer, his widow and sole heir, but that appellant was, during all the time aforesaid, an infant and a married woman, and two years have not elapsed since she arrived at the age of twenty-one years.

It is further averred that appellant had no legal guardian during the time aforesaid, and that upon the trial of said cause, and during the proceedings aforesaid, no guardian *ad litem* was appointed to appear and defend said action for her, and that she did not appear to said ³⁷⁷ cause either in person or by guardian *ad litem*, but that said appearance and defense was made solely by attorney; that said John D. Baer and appellant Slipher knew that the plaintiff and her then husband, Charles Slipher, were infants at the time of the aforesaid trial and sheriff's sale, during all the time aforesaid. Prayer was made asking that said judgment and sheriff's sale

be declared void and be set aside, and for all proper relief to this complaint. Appellee Baer demurred for want of facts, and appellee Slipher demurred for the same cause. Appellee Slipher filed a cross-complaint, alleging himself to be the owner of the real estate, and appellant filed an answer to the cross-complaint of Slipher, alleging the same facts as are alleged in the complaint, and Slipher demurred to the answer for want of facts. The court sustained the demurrers to the complaint and to the answer, to which rulings appellant excepted, and, refusing to plead further, judgment was rendered on demurrer in favor of appellees. These rulings are assigned as errors.

As appears from the averments of the complaint, this is a proceeding to set aside the judgment and decree of foreclosure of the mechanic's lien, on the sole ground that the judgment is invalid, for the reason that the appellant appeared to the action in which the judgment was rendered, and made her defense by attorney, and not by guardian *ad litem* appointed by the court.

There is no equity shown in the bill. From aught that appears, the appellant was properly served with process, and the judgment was on a valid indebtedness of the appellant in favor of the plaintiff.

In Freeman on Judgments, 4th edition, section 151, it is said: "The general tendency is to regard the plea of infancy as a personal plea which may be waived. And whether such plea is interposed or not, a judgment or decree against an infant, properly before the court, is as ³⁷⁸ obligatory upon him as though he were an adult, except in case where he is allowed time, after coming of age, to show cause against the judgment or decree. If an absolute decree is made against an infant he is as much bound as a person of full age, and will not be permitted to dispute the decree, except upon the same grounds which would be available if he were an adult. Though the statute requires the appointment of a guardian *ad litem* to represent the interest of minors who have no general guardian, it is well settled that where process has been served upon a minor the failure to appoint a guardian *ad litem* for him is a mere irregularity not affecting the validity of the judgment."

This statement of the law by Freeman is in harmony with the decisions of this court.

As early as the case of *Blake v. Douglass*, 27 Ind. 416, it

was held that the plea of infancy is a personal privilege that may be waived. If not pleaded, a judgment against an infant is binding upon him. In that case, speaking of infancy, the court said: "It was a personal privilege, and having failed to avail himself of it at the proper time, by suffering judgment to be taken against him by default, the judgment is binding upon him." The court further said: "A judgment taken against an infant by default, without the appointment of a guardian *ad litem* to appear for him, is erroneous, but not void." This doctrine has been universally adhered to by this court.

In *McBride v. State*, 130 Ind. 525, the case of *Blake v. Douglass*, 27 Ind. 416, was cited and followed, holding that a judgment against a minor without the appointment of a guardian *ad litem* was valid, and not subject to collateral attack.

In *Freeman on Judgments*, 4th edition, section 513, it is said: "But the better opinion is, that an infant defendant ³⁷⁹ is as much bound by a decree in equity as a person of age; therefore, if there be an absolute decree made against a defendant who is under age he will not be permitted to dispute it, unless upon the same grounds as an adult might have disputed it, such as fraud, collusion, or error."

The judgment being as binding upon the appellant as if she had been of full age when it was rendered, it is clear that there are no facts alleged in the complaint which authorize the setting of it aside. Furthermore, we think it must be regarded as a collateral attack, and the judgment being erroneous, and not void, it is not subject to such attack.

It is a well-settled rule that an attack upon a judgment predicated upon matter *dehors* the record, where the invalidity of the judgment is sought to be shown by bringing forward matter extraneous to the record itself, is a collateral attack, and cannot be made by a party to the judgment: See *Harman v. Moore*, 112 Ind. 221, and authorities there cited. That is what is sought to be done in this case.

It is sought to be shown that the judgment is invalid, for the reason that the appellant was an infant at the time of the rendition of the judgment, which fact does not appear of record, but if shown at all, must be shown by facts *dehors* the record, and this cannot be done. By the failure to interpose her plea of infancy in the original action appellant waived it, and the judgment is as binding upon her as if she had

been of full age at the date of its rendition: *Littleton v. Smith*, 119 Ind. 230.

It is suggested by counsel for appellant, that there is no adequate remedy provided by statute for the relief of an infant from a judgment rendered against him, when his infancy does not appear of record, and that this is an application to have the court below recall the judgment, not ³⁸⁰ for error of law, but error in fact, and that the remedy is by a writ of *coram nobis*. But with this we cannot agree, for, by the failure to interpose the plea of infancy, she waived it, and, having waived it, the fact of her infancy is not available of itself to set aside the judgment.

The complaint is insufficient, and does not state facts entitling the appellant to be relieved from the judgment; and, likewise, the answer is also insufficient, and the demurrers thereto were properly sustained.

Judgment affirmed.

In the case of *Clark v. Hillis*, 134 Ind. 421, it appeared that James Clark in July, 1853, was unmarried and owned eighty acres of land, which he then conveyed to his mother, Catharine Clark, a widow, for her natural life, and then to revert to him and his heirs.

Thereafter he intermarried with Lorinda Collum, who bore him the following children living at the time he died intestate, James M., Malinda, Dulcencia A., Helen I., and Eliza J. On February 18, 1871, the administrator of James Clark petitioned the proper court to sell said lands subject to the life estate of Catharine Clark for the payment of the debts of said James. The petition named as his surviving children, Malinda, Eliza J., Dulcencia A., James M., Jane M. Clark, and ——— Clark, omitting Helen I. Clark.

The record recited that at a subsequent term of court the administrator made proof of the publication and posting of notices of the pendency of said petition. Appraisers were then appointed, and the land duly appraised. The administrator was then ordered to file, and did file, an additional bond, which was duly approved by the court. The court then ordered a private sale of the land without notice. At a subsequent term of the court the administrator reported, under oath, that he had given notice of the time, terms, and land to be sold, by publication for three weeks successively in a named weekly newspaper, and by posting printed notices in five public places in the county, and, that pursuant thereto, he sold said land to A. Hillis for its appraised value. James Clark was divorced from his wife, Lorinda, prior to his death, and Catharine Clark died October 21, 1887. The five living children of James Clark and his divorced wife, Lorinda, sought in this action to recover the lands and quiet the title thereto as against said Hillis. They were defeated in the lower court, and no question was made on appeal as to the sufficiency of the pleadings, but error was assigned upon the overruling of the joint motion of all of the appellants for a new trial, and of the separate motion by Helen I. Clark for a new trial.

It was also contended by the appellants that James Clark held no title in

said lands at the time of his death, subject to sale for the payment of his debts, and also that the sale by the administrator was void, even if said James held an interest subject to sale for the payment of his debts.

In passing upon the questions thus presented, the supreme court said: "From the record of the proceeding to sell, Helen I. Clark is not named as an heir of said James, but the other children are named, and must be treated as parties. If the record were silent on the subject of notice to those who were parties to the proceeding it would be presumed that such notice had been given: *Doe, on demise, etc. v. Harvey*, 3 Ind. 104; *Gerrard v. Johnson*, 12 Ind. 636; *Hawkins v. Ragan*, 20 Ind. 193; *Abdil v. Abdil*, 33 Ind. 460; *Ayers v. Harshman*, 66 Ind. 291; *Crane v. Kimmer*, 77 Ind. 215; *Horner v. Doe, on demise, etc.*, 1 Ind. 130; 48 Am. Dec. 355; *Exchange Bank v. Ault*, 102 Ind. 322. Here it appears expressly that notice was given, by publication and posting, of the pendency of the proceeding. The absence from the files of the notice so found will not defeat the presumption that it was the proper notice.

"If the infirmity from which a judgment is attacked does not appear from the face of the record of a court of competent jurisdiction the judgment is not void: *Palmerton v. Hoop*, 131 Ind. 23; *Earle v. Earle*, 91 Ind. 27.

"The absence from the files of the proof of notice of sale should not affect the validity of the sale, for the reasons stated as to the notice of the pendency of the proceeding. But it is insisted that the court ordered the sale without notice, when, from the appraised value of the land, notice was required by law. The statute did not require the order of sale to direct the giving or withholding of notice, and while notice was required, and while the court did the unnecessary act of directing the sale without notice, the administrator did his duty in the giving of notice, as we find from the record. While there might be some doubt of the presumption of notice as against the order of sale without notice, where we find that notice was given the order as to notice will be disregarded.

"The record ordered the administrator to execute an additional bond, and it appears that he did so, though the bond is not in the record. That he gave no such bond will not be presumed, as we have shown. However, the failure to execute such bond has been held not to invalidate a sale, where it does not appear that the proceeds of the sale were misappropriated: *Foster v. Birch*, 14 Ind. 445; *Degundre v. Williams*, 31 Ind. 444; *McKeever v. Ball*, 71 Ind. 398; *Marquis v. Davis*, 113 Ind. 219." It is to be inferred that the appellants, except Mrs. Clark, were minors at the time the lands were ordered sold, although this fact does not appear from the record of the proceeding to sell. The court then acted, so far as is disclosed by the record, without knowledge of their infancy, but the judgment for that cause was not void, and the failure of the court to appoint a guardian *ad litem* was only collateral to that error. Any such attack upon the judgment for want of jurisdiction of the court to render it, predicated upon matter *dehors* the record, is collateral, and cannot be sustained: *Cully v. Shirk*, 131 Ind. 76; 31 Am. St. Rep. 414; *Harman v. Moore*, 112 Ind. 221; *Cain v. Goda*, 84 Ind. 209; *Lantz v. Maffett*, 102 Ind. 23; *Earle v. Earle*, 91 Ind. 27; *Indianapolis etc. R. W. Co. v. Harmless*, 124 Ind. 25. "We feel constrained to hold, for the reasons given, that the sale, as to the heirs of James Clark, other than Helen I. Clark, was not void, and if they can recover, it must be upon the theory of a direct attack upon the proceedings of the probate court. An action to review a judgment is given by statute, and the causes therefor are (Rev. Stats. 1881, sec. 616) 'for any error of law appearing in the proceedings and judgment, or for material new matter discovered since the ren-

dition thereof'; the review here sought is not for material new matter discovered since the rendition of the judgment. It can only be for error appearing in the proceedings and judgment; for error apparent on the face of the record: *Rice v. Turner*, 72 Ind. 559; *Richardson v. Houck*, 45 Ind. 451; *Train v. Gudley*, 36 Ind. 241; *Preston v. Sandford's Admr.*, 21 Ind. 156; *Shoaf v. Joray*, 86 Ind. 70.

"Review may be had only when the same relief might be had by appeal from the judgment sought to be reviewed: *Baker v. Ludlam*, 118 Ind. 87; *American Ins. Co. v. Gibson*, 104 Ind. 336; *Shoaf v. Joray*, 86 Ind. 70; *Traders' Ins. Co. v. Carpenter*, 85 Ind. 350; *Tachau v. Fiedeldey*, 81 Ind. 54.

"In the last of the cases cited, as in many others, it is made manifest that, though a direct attack, the proceeding to review is not for errors to be established *dehors* the record. The proceeding has for its object the correction of some error upon the face of the proceeding and judgment, by invoking the action of the court committing such error. It is a substitute for the remedy by appeal, and is of the same nature: *Traders' Ins. Co. v. Carpenter*, 85 Ind. 350.

"The appellants use the remedy to introduce matters not apparent upon the face of the record, so far as all are concerned, excepting Helen I. Clark. As to her, the face of the record discloses that the court had no jurisdiction over her person. She was not in court; not a party to the proceeding.

"Notice to — Clark, by publication, is not binding upon Helen I. Clark, and she may attack the proceeding collaterally, because void as to her, the record expressly showing the infirmity as to her: *Schissel v. Dickson*, 129 Ind. 139; *Hawkins v. Hawkins*, 28 Ind. 66.

"The judgment is reversed as to Helen I. Clark, and is in all things affirmed as to the other appellants."

INFANTS — JUDGMENTS AGAINST — COLLATERAL ATTACK.—A judgment against an infant which is merely erroneous, and not void, may be corrected on appeal; if fraudulent, or obtained by collusion, it must be attacked in a direct proceeding and not collaterally: *Joyce v. McAvoy*, 31 Cal. 273; 89 Am. Dec. 172, and extended note; *Beeler v. Bullitt*, 3 A. K. Marsh. 161; 13 Am. Dec. 161; *Dahms v. Alston*, 72 Iowa, 411. But see *Coffin v. Cook*, 106 N. C. 376; also the note to *Porter v. Robinson*, 13 Am. Dec. 160.

PEDEN v. CAVINS.

[134 INDIANA, 494.]

PARTITION—**STATUTE OF LIMITATIONS OF TWENTY YEARS** is not applicable to an action of partition.

PARTITION—**ADVERSE POSSESSION**.—To make a plea of the statute of fifteen years a good defense to a suit for partition it must show a holding adversely for fifteen years.

PLEADING.—A BAD REPLY IS GOOD TO A BAD ANSWER, and it is not error to overrule a demurrer to such reply.

PARTITION — **CLAIM FOR IMPROVEMENTS** — **COUNTERCLAIM FOR RENTS**.

When, in an action for partition, one tenant claims reimbursement for improvements made while in possession, the other tenants may set up a counterclaim for rents and profits due them, and received by the ten-

ant in possession prior to making the improvements, and the court must take such rents and profits into account in making the adjustment.

SETOFF—STATUTE OF LIMITATIONS.—The life of a setoff is equal to that of the original claim, and is only barred when the original claim is barred.

PARTITION—TRIAL BY JURY.—When, in an action for partition, issues are joined on a cross-complaint demanding an accounting between the tenants, and involving matters of exclusive equitable jurisdiction, triable by the court alone, a demand for a trial of the whole case by a jury is properly refused.

JURY TRIAL—WHEN PROPERLY REFUSED.—If several issues are joined in a case, some triable by jury and some by the court, a demand for a jury to try all of the issues is properly refused.

PARTITION—COMMISSIONERS' REPORT—VARIANCE.—A motion to set aside the report of commissioners in partition on the ground of a variance between the description of the land in the order for partition and the description in the report of the commissioners is properly refused, unless such variance affirmatively appears of record.

W. R. Gardiner and S. H. Taylor, for the appellant.

W. W. Moffett and C. E. Davis, for the appellees.

495 OLDS, J. This is a suit for the partition of certain real estate situate in Greene county, Indiana. The suit was instituted in the Greene circuit court, and the venue afterwards changed to the Daviess circuit court, where there was a trial by the court, a special finding of facts, and conclusions of law stated, and judgment rendered in favor of the appellees, from which judgment this appeal is prosecuted.

The complaint is, in form, an ordinary complaint in partition.

It appears that one Hughes East and wife conveyed all of the lands to the appellant in 1866, and put the appellant in possession of the same. In 1883 one Rebecca East asserted her ownership in the undivided one-half of **496** the land, and at that time prosecuted an action in ejectment against the appellant, and recovered a judgment in said cause, establishing her title to the one-half of the land, and for four hundred and sixty dollars damages, which appellant paid. Afterwards, Rebecca East and her husband conveyed her one-half interest in the land to the appellees, Aden G., Elijah, and William Cavins, who instituted this suit against the appellant for partition.

Exceptions were taken to various rulings of the court, which were properly reserved, and assigned as error, and which are discussed by counsel.

The second paragraph of answer to the complaint is the

twenty years' statute of limitation, and the third paragraph pleads the fifteen years' statute of limitation.

These two paragraphs of answer are each a general plea of the statute of limitation.

The third paragraph of reply to these two paragraphs of answer pleaded the judgment in the ejectment case of Rebecca East.

To this paragraph of reply the appellant demurred, and the court overruled the demurrer, and this ruling is the first alleged error discussed.

The twenty years' statute of limitation is not applicable to an action in partition: *McCray v. Humes*, 116 Ind. 103.

Indeed, neither of the paragraphs of answer was good as pleaded. It has been held that the fifteen years' statute of limitation was applicable to a partition suit in the case above cited. When one cotenant holds possession to the exclusion of the others claiming to own the whole, and holding it adversely to the other cotenants, then an action for partition by a cotenant would be barred, but when cotenants own land, and neither holds possession adversely to the others, the fact that they hold the lands as tenants in common for more than fifteen ⁴⁹⁷ years does not bar the right of either to partition, though they may have enforced that right at any time from the date when they so became tenants in common in the land. To make a plea of the statute of fifteen years a good defense to a suit for partition it must show a holding adversely for fifteen years.

The answer in *McCray v. Humes*, 116 Ind. 103, showed a holding adversely, under claim of title, for fifteen years, and the holding in that case was correct. To the same effect is the holding in the case of *Nutter v. Hawkins*, 93 Ind. 260.

It would be an anomalous doctrine to hold that when, as in this case, a tenancy had run over fifteen years, and that after one tenant had prosecuted an action in ejectment against his cotenant, and established his title to the land, he could not then maintain an action in partition and have his portion of the land set apart to him.

In *Jenkins v. Dalton*, 27 Ind. 78, it was held that a failure to assert the right for partition for a period of twenty years will not bar an action for partition. The court, in speaking of the partition of lands, says: "In such a case the right to the partition exists from the date of the tenancy. It may or may not be exercised, in the discretion of the tenants. All

the tenants have an equal right to possession, and may all be satisfied to enjoy the estate in common. Partition may not be desired by any one or more of the tenants for a period of time greater than that prescribed by any statute of limitation; and the fact that such a period is suffered to elapse does not, in any manner, affect the right of one or more of the tenants to have partition": Freeman on Cotenancy, sec. 491.

There was no error in overruling the demurrer to this ⁴⁹⁸ paragraph of reply. A bad reply is good to a bad answer, so whether it is sufficient for a good answer or not, it was not error to overrule a demurrer to it, as the answers were bad.

The appellant filed a cross-complaint, alleging that he had been the owner of one-half of the land for twenty-five years; that he had made valuable and lasting improvements thereon, paid taxes on all the land, aggregating one thousand dollars.

The appellees answered the cross-complaint, and in the fourth paragraph of the answer alleged that appellant had been in possession as tenant in common with their grantor long before he made the improvements, and had received the rents and profits for all the land, amounting to three thousand dollars, one-half of which belonged to the cotenant, and had received and converted to his own use walnut trees and other valuable timber growing thereon of the value of five hundred dollars, which sums they asked to have taken into account, and set off as against any sum allowed appellant on his claim for improvements and taxes. To which fourth paragraph of answer appellant demurred, and the demurrer was overruled, and this ruling is the next alleged error discussed.

Freeman on Cotenancy, section 510, lays down this doctrine: "As the allowance of compensation for improvements is, in all cases, made, not as a matter of legal right, but purely from the desire of the court to do justice, the compensation will be estimated so as to inflict no injury on the cotenant against whom the improvements are charged. He will therefore be charged, not with the price of the improvements, but only with his proportion of the amount which at the time of partition they add to the value of the premises. From this amount he will also be entitled to deduct any sum to which he may have a just claim for ⁴⁹⁹ use and occupation of his moiety enjoyed by the cotenant making the improvements."

In *Alleman v. Hawley*, 117 Ind. 532 (538), this court says: "The appellant's right to compensation for her improvements is not a legal right depending upon a statute, but is a right resting upon equitable principles, and one which a court of equity will enforce."

The cross-complaint pleaded a state of facts in relation to the occupancy of the land and the making of improvements, which gave him an equitable right to compensation for them, and the answer not controverting the manner of his occupancy, pleaded the fact that while so occupying he had received the rents, and had taken and used valuable growing trees, stating the amount and value of each. This, we think, was sufficient to make a good answer to the counterclaim, that it might be taken into account, and adjusted in determining what amount, if any, was due the appellant for improvements and taxes alleged to have been made and paid by appellant. It would be inequitable to hold, where a cotenant, in possession of the whole land, has received the rents for a number of years, and while he so holds the share of rents due his cotenants, he makes improvements, that when partition was sought, the tenant in possession could recover the full value of the improvements made, without deduction for the rents received by him due his cotenants; and we think that when a tenant asks an allowance for improvements made while in possession, an answer setting up the facts as to the receipt of the rents due the cotenant, showing, as in this case, that he had received the rents prior to the making of the improvements, it states a good defense, as a counterclaim or setoff to the action, to authorize the court to take into account the rents in making the adjustment.

The cross-complaint alleges a state of facts in relation **500** to the possession of the land and the making of improvements which, in equity, entitles the occupying tenant to compensation for the improvements, and the answer sets up additional facts, showing that while so occupying the land the tenant received rents belonging to his cotenants, from which he seeks to recover compensation for the improvements made, which in equity and good conscience should be taken into account in determining what amount, if any, should be charged against the other tenant for improvements. It would be manifestly unjust and inequitable to allow the occupying tenant to retain the share of the rents received by him belonging to the other joint owners, and permit him to collect from

them the full amount and value of the improvements made. We are cited to *Carver v. Coffman*, 109 Ind. 547, as holding that such an answer must allege the holding adversely, and an ouster of the tenant. The answer in that case alleged that fact, and it was held good, but that decision we do not think in conflict with our conclusion. Were it an independent action to recover rents, it would present a different question; but this seeks only to set off the rents, or, rather, to have the rents taken into account in fixing the amount, if any, that the tenant out of possession ought to pay for improvements, and the answer, we think, is good for that purpose.

The next ruling of the court complained of is in sustaining the demurrer to the second and third paragraphs of reply to the fourth paragraph of answer to the cross-complaint. These paragraphs of reply pleaded the six and fifteen years' statute of limitations to the answer of setoff. There was no error in this ruling. The life of a setoff is equal to that of the original claim, and is only barred when the original claim is barred: *Hyatt v. Cochran*, 85 Ind. 231.

501 The next alleged error discussed relates to the ruling of the court in refusing to allow a trial of the whole case by the jury. At the proper time, the appellant "moved the court for, and demanded, a jury to try the issues joined." This demand was for the trial of all the issues found by a jury. We are cited by counsel for appellant to the decision in *Kitts v. Willson*, 106 Ind. 147, as supporting the right of appellant to a trial by jury. The decision of *Kitts v. Willson* was modified to some extent in the case of *Martin v. Martin*, 118 Ind. 227.

Whatever may be the rule in relation to the right to trial by jury in partition, where there is involved the simple question of the right to partition or the quieting of the title, this case presents a different question. In this case issues are also joined on a cross-complaint. The cross-complaint and issues joined thereon involve matters of exclusive equitable jurisdiction. It is an application for an accounting between the tenants. It is an equitable right which appellant seeks by his cross complaint to have enforced and an allowance made to him for the value of improvements made under such circumstances as he in equity is entitled to compensation for. The issues joined on the cross-complaint were triable by the court. The demand being for a trial of these issues, as well as those joined on the complaint, it covered

more than appellant was entitled to, and it was properly overruled. Had appellant demanded a trial of the issues joined on the complaint by a jury, it would have presented a different question.

The statute (Rev. Stat. of 1881, sec. 409) makes some issues triable by the court and some triable by the jury, even when joined in the same action, and a demand for a jury should only include a demand for the trial of such issues as are triable by a jury, and when several issues are joined in a cause some triable by jury and some by ⁵⁰² the court, and a demand for a jury to try all of the issues is made, it is not error to refuse it. It is a well-settled rule that a motion must include only such relief as the party making it is entitled to, else it will not be error to overrule it.

There was no error in refusing the appellant's demand for a jury to try the issues joined.

It is contended that the court erred in its conclusions of law, for the reason that the court finds the improvements made by appellant to be of a certain value, and that he paid the judgment to Mrs. East, and that there is no conclusion giving to either party any sum due them. The findings show the payment by appellant of a much larger sum for rent during his occupancy than is due him for improvements and sums paid by him, and he cannot complain that the court did not conclude there was a sum due him.

Finally; it is contended that the court erred in overruling appellant's objections to the report of the commissioners and motion to vacate the same. This alleged error is based on the contention that the commissioners included in their report other lands than those embraced in the order of the court and setting the same off to the appellant. That is to say, it is contended that the commissioners embraced in their report other lands than those described in the proceedings and order, and in dividing the land they set apart to the appellant, and included in the description of the land set apart to him, lands other than those which were being partitioned, and which were not included in the partition proceedings, but in this counsel are in error. The descriptions in the record correspond; at least, it is not affirmatively made to appear that they do not, which is necessary to show error. The descriptions in the pleading and order are general, the land being designated by governmental subdivisions, ⁵⁰³ one of which is fractional; no number of acres are stated, and no

metes and bounds are given, while in the report the land is divided and described by metes and bounds. There is nothing to show affirmatively that the two descriptions do not correspond. They appear to correspond.

There is no error in the record.

Judgment affirmed.

SETOFF OR COUNTERCLAIM.—STATUTE OF LIMITATIONS AGAINST: See the note to *Beecher v. Baldwin*, 3 Am. St. Rep. 63, 64, where the cases are collected.

PARTITION.—ADVERSE POSSESSION AS A DEFENSE: See *Weston v. Stoddard*, 137 N. Y. 119; 33 Am. St. Rep. 697, and note with the cases collected; and the extended note to *Nichols v. Nichols*, 67 Am. Dec. 704. To a complaint for partition, an answer alleging that the interest of the plaintiff had been sold for taxes more than twenty years before the bringing of the suit, but failing to show that possession was taken under the sale and held for twenty years, is bad: *English v. Powell*, 119 Ind. 93.

PARTITION.—COMMISSIONERS' REPORT—SETTING ASIDE.—Parol evidence is admissible to show that the partition reported by commissioners is unequal and ought to be disapproved: *Riggs v. Dickinson*, 2 Scam. 437; 35 Am. Dec. 113. Upon the question of setting aside the return of commissioners appointed to partition lands, parol evidence of their proceedings not appearing in the return is competent so far as it tends to show mistakes of law made by the commissioners which materially affect the equality or justice of the partition: *Hall v. Hall*, 152 Mass. 136. See, also, *Ransom v. High*, 37 W. Va. 838; 38 Am. St. Rep. 67, and note.

CASES
IN THE
SUPREME COURT
OF
IOWA.

MUSCATINE WATER CO. v. MUSCATINE LUMBER CO.

[85 IOWA, 112.]

A CORPORATE SEAL IS NOT ESSENTIAL to the validity of a corporate contract.

CONTRACT.—**WANT OF MUTUALITY** in a contract is no defense to an action thereon, if it was in the nature of a continuing offer which the other contracting party has accepted, and he has performed every thing which the contract left him the option of performing.

A CONTRACT NEED NOT BE SIGNED BY BOTH PARTIES.—It is sufficient that it is signed by one, and accepted and performed by the other.

A CONTRACT WITH A WATER COMPANY IS NOT WITHOUT CONSIDERATION, IF It is for the payment of a certain sum on the extension of the water system to a specified locality, and such extension is made in consequence of the contract; nor is the contract rendered void by the fact that the municipality, as well as private persons, also paid the water company for water furnished by it to the same locality.

Richman and Burk, and E. F. Richman, for the appellant.

J. Carskaddan, for the appellee.

¹¹² **ROBINSON, C. J.** In the year 1882 the plaintiff owned and operated a system of water works in the city ¹¹³ of Muscatine, and the defendant owned a lumber-mill and lumber-yard situated on blocks numbered 18, 19, and 20, in the same city, between Front and Second streets, and on some lots north of Second street, opposite the blocks specified. On the sixteenth day of March, 1882, the board of directors of the plaintiff took action, shown by the minutes of its proceedings, as follows:

“Resolved, That the street mains be extended on Second and Cypress streets (when authorized by the city

council) provided the Muscatine Lumber Company will, by proper instrument, entitled to be recorded, covenant and agree to pay to this company the sum of two hundred and fifty dollars per year for ten years succeeding the date when the water is turned on and provided no liability be incurred by this company for any failure to keep a constant supply of water in such extension."

On the twenty-ninth day of the same month the board of directors of the defendant, as shown by the minutes of proceedings, took the following action:

"Mr. P. Musser reported that the water works company would extend the pipes, hydrants, and so forth, as asked for; the Muscatine Lumber Company to pay the water works company two hundred and fifty dollars per annum for ten years. Dr. Robertson moved that above proposition be accepted by the board. Same was unanimously agreed to. It was resolved that the whole matter of water works be left with the executive committee to arrange all details and special agreements with a like committee on the part of water works company."

On the eleventh day of the next month the plaintiff was notified of the acceptance of its proposition, and a committee was appointed to draft a contract for execution by the defendant. On the twenty-fifth day of that ¹¹⁴ month the committee reported an agreement for execution, which, after amendment, read as follows:

"WHEREAS, It is proposed by the Muscatine Water Works Company (provided said company be duly authorized so to do by the city council of the city of Muscatine) to extend the street main or pipe on Second street in said city from Oak to Cypress street, and thence on Cypress to Front street, and place on such extension four fire-hydrants for fire protection, to wit: One at intersection of Second and Spring streets, one at intersection of Second and Poplar, one at intersection of Second and Cypress, and one at intersection of Cypress and Front streets; AND WHEREAS, said extension will be for the manifest advantage and benefit of the Muscatine Lumber Company, in affording protection from fire to its premises and property; now, therefore, it is hereby covenanted and agreed by the said Muscatine Lumber Company to and with said water works company that in case the above-named extension is made, and hydrants placed, the said lumber company shall and will, at the end of every

year from the date at which the said extension is completed, and water turned on the same, ready for use for fire protection, at and from said hydrants, pay into the said water works company the sum of two hundred and fifty dollars (\$250.00); such yearly payments to continue and be made for the full term of ten (10) years from the aforesaid date. And the said water works company shall incur no liability to the said lumber company for any failure to constantly keep and have a supply of water in the pipes and hydrants of said extension.

"In witness whereof, the said Muscatine Lumber Company has caused this instrument to be subscribed by the president and attested by the secretary thereof, this twenty-ninth day of April, 1882.

J. S. PATTEN,

"Attest:

"President."

"S. B. Cook, Secretary."

¹¹⁵ It appears that the agreement as amended was signed in behalf of the defendant by its president and secretary, on the twenty-ninth day of the month; and on the ninth day of the next month the plaintiff was informed that it had been executed, and directed its executive committee to order the necessary material for the extension. The extension was completed, and the hydrants placed as required by the agreement, in the spring or early in the summer of that year. The defendant paid to plaintiff the annual charge of two hundred and fifty dollars from the time the extension was completed, excepting for a short time in the year 1883 or 1884, when water was not supplied because of a broken pipe, for which the charge was remitted until the twelfth day of June, 1886. On that date the mill and lumber of the defendant were destroyed by fire. The fire also broke the extension at the crossing of Mad creek, but in July the plaintiff ordered the break to be repaired, and the repairs were made and connection restored by October. The annual charge has been paid to June 15, 1886; but the defendant has not rebuilt its mill, and has refused payment for charges accruing since the date named. This action is brought to recover the amount payable, according to the terms of the agreement, for the time commencing on the first day of October, 1886. The district court found in favor of the plaintiff for the amount claimed, and rendered judgment against the defendant for the sum of eight hundred and twenty-three dollars and twenty-five cents and costs.

1. The appellant contends that the contract in suit is invalid, for the reason that no seal of either corporation is attached to it. Section 2112 of the code contains the following: "The use of private seals in written contracts, except the seals of corporations, is abolished." It is argued from this that the use of private seals by corporations ¹¹⁶ is governed by the rules of the common law, and that such seals must be affixed to all contracts not covering the scope of the ordinary everyday functions of the corporations. That is not the law of this state. On the contrary, it was said in *Merrick v. Burlington etc. Plank Road Co.*, 11 Iowa, 76, that "the doctrine is now well settled that corporations of all kinds may be bound by contracts not under their seal. They may make a binding contract in writing without using the seal, and so they may be held liable on verbal contracts; and as they may make, so they may ratify and adopt as their own, without the use of the seal, that which has been done by another, or an officer out of the usual line of his duties." In 1 Morawetz on Private Corporations, section 338, this language is used: "It is now a rule well settled throughout the United States that a corporation may make a contract without the use of a seal in all cases in which this may be done by an individual." A corporation organized under the laws of this state may have a common seal, but it is not required to have one; and it is a matter of common knowledge that corporations in large numbers organize and do business in the state, making contracts and conveying property, without using or having a seal. There is nothing in this case to show any requirement, on the part of either party to the agreement in question, that its contract should be under seal, nor that either had a seal. There is no presumption, in the absence of evidence to that effect, that the agreement was invalid for want of a seal; and no presumption of that kind is raised by any thing contained in the record.

2. It is said that the plaintiff was not bound by the agreement, and that the contract was not mutual, and therefore not valid. It is true that the contract did not, in terms, require the plaintiff to make the extension of its works contemplated, and it may not have incurred liability if it had ¹¹⁷ failed to make it. But the evidence shows that the contract was the result of negotiations between the parties, and that it was designed to be a formal offer on the part of the defendant, to be accepted by the plaintiff, and to be in full force

when its terms were complied with by the plaintiff. It was in the nature of a continuing offer, which became vitalized as a contract by the performance of its condition on the part of the plaintiff.

It was not necessary that it be signed by both parties. It was formally entered into on behalf of the defendant by its president and secretary, and was accepted by the plaintiff, and the extension was made according to its terms. Under these circumstances it was not necessary that the instrument be signed on behalf of both parties to make it binding upon both: *Dows v. Morse*, 62 Iowa, 232. Moreover, the minutes of the proceedings of the board of directors of the plaintiff show an acceptance of the proposition, and the defendant has received and enjoyed the benefit it was designed to confer.

3. In addition to the annual charge which the contract required the defendant to pay, the plaintiff, under its contract with the city of Muscatine, received from it sixty dollars annually for each hydrant included in the extension. These hydrants were intended for use as fire hydrants, for the protection of property in the city, including the mill and lumberyard of the defendant, against fire. The defendant had no use of the hydrants, excepting that to which the city was entitled, and had no private use of the water furnished by the extension. It is argued from these facts that the plaintiff exceeded its power in exacting from the defendant a contract to pay a sum in addition to that paid by the city; that it was against public policy for the plaintiff to contract for compensation for the use of the ¹¹⁸ hydrants in addition to that paid by the city, and that there was no consideration for the contract on the part of the defendant.

If it were true that the extension would have been made without the contract, or that the plaintiff was under obligation to make it in consequence of its agreement with the city, there would be much force in the claims of the defendant. The contract recites, in effect, that the plaintiff proposes to make the extension; but when the negotiations of the parties are considered, it is clear that the purpose was entertained only in consequence of the proposal of the defendant to give the sums named in the contract, in addition to those for which the city would be liable in case the extension should be made. The showing made by the evidence is supplemented by a stipulation made by the parties, that the extension would not have been made but for the agreement of the defendant to

pay the extra sum specified. Nothing in the record, aside from the agreement in suit, shows any obligation on the part of the plaintiff to make the extension. The expense of making it may have been large, and the private consumers of water to be expected by reason of it may have been few, if there were any. The prospect of revenue from it, as compared with the expense of constructing and maintaining it, may have been such that no prudent business man would have made it but for the extra compensation promised. The evidence justifies the conclusion that the defendant was the one chiefly interested in the extension, and probably the only one who would be benefited by it. As the plaintiff was under no obligation to make the extension, it was competent for the defendant to offer an inducement, in the form of a promise to pay stipulated sums of money, to have the extension made. What amount it could afford to pay was a matter for it to decide, but, in agreeing to pay the amount in controversy, it acted ¹¹⁹ on a legal consideration, presumably for its own interest. The amount agreed upon was not a mere gratuity, but was for value in the form of additional security against fire. There was nothing in the transaction contrary to public policy, nor did the plaintiff exceed its just powers in executing the contract.

The judgment of the district court is affirmed.

CORPORATIONS—CONTRACTS—NECESSITY FOR SEAL.—Contracts not under corporate seal may be binding: *Mott v. Hicks*, 1 Cow. 513; 13 Am. Dec. 550, and extended note; *Ross v. City of Madison*, 1 Ind. 281; 48 Am. Dec. 361, and note. While a seal is not essential to the validity of a chattel mortgage executed by a corporation, still, in its absence, there is no presumption that the act is a corporate act: *Duke v. Markham*, 105 N. C. 131; 18 Am. St. Rep. 889, and note. A conveyance of land of a corporation, executed by its officers, where the purchase money is paid, passes the equitable title without the corporate seal: *McIver v. Abernathy*, 66 Miss. 79. A corporate seal is not necessary to an agreement to convey real property: *The Banks v. Poiteaux*, 3 Rand. 136; 15 Am. Dec. 706. Sealing is the essential part of the execution of a contract by a corporation: *Zihlman v. Cumberland Glass Co.*, 74 Md. 303. The requirement of the statute that contracts by corporations exceeding one hundred dollars shall be in writing, and under the seal of the corporation, or signed by some authorized officer of the company, refers to executory contracts, and is mandatory: *Curtis v. Piedmont Lumber etc. Co.*, 109 N. C. 401.

CONTRACTS—MUTUALITY, WHEN NOT ESSENTIAL.—A promise lacking mutuality at its inception becomes binding upon the promisor after performance by the promisee: *Willels v. Sun Mutual Ins. Co.*, 45 N. Y. 45; 6 Am. Rep. 31. In suits upon unilateral contracts the defendant is held bound if

he has had the benefit of the consideration for which he bargained: *Cooper v. Lansing Wheel Co.*, 94 Mich. 272; 34 Am. St. Rep. 341. For a further discussion of this subject, see *South etc. Alabama R. R. Co. v. Highland Ave. etc. R. R. Co.*, 98 Ala. 400; *ante*, p. 72, and note; and the notes to *Eno v. Woodworth*, 53 Am. Dec. 373; *Atlee v. Bartholomew*, 5 Am. St. Rep. 113, and the extended note to *Benedict v. Lynch*, 7 Am. Dec. 492.

HODGE v. SHAW.

[85 IOWA, 187.]

JUDGMENT—ESTOPPEL.—THE MOST INFALLIBLE TEST as to whether a former judgment is a bar is to inquire whether the same evidence will maintain both the present and the former action.

JUDGMENT—ESTOPPEL.—IF THE PARTIES ARE THE SAME the legal effect of a former judgment is not impaired because the subject matter of the second action is different, provided the former suit involved the same title and depended upon the same question.

JUDGMENT.—THE FACT THAT THE PLAINTIFF IS GIVEN BUT A PART OF THE RELIEF which he seeks in an action is an adjudication that he is not entitled to any other.

FORMER RECOVERY.—A JUDGMENT IN FAVOR OF PLAINTIFF FOR A SUM OF MONEY in a suit in which he claims damages for the obstruction of a right of way granted him by the defendant, and asks that defendant be required to furnish him another right of way to the same premises, is a full and complete recovery, and plaintiff cannot maintain any further action either to recover for the continued obstruction of the old right of way or for the failure to furnish him another right of way in place of that so obstructed.

NUISANCE.—ALL DAMAGES FOR A NUISANCE ARE RECOVERABLE IN ONE ACTION WHEN it is of such a character that its continuance is necessarily an injury, and it is of a permanent character which will continue without change from any cause but human labor.

ALL DAMAGES FOR OBSTRUCTING A RIGHT OF WAY MUST BE RECOVERED IN A SINGLE ACTION if the obstruction consists of a permanent brick building rendering the way impassable for any purpose.

Hayes and Schuyler, and B. F. Thomas, for the appellant.

Charles M. Dunbar, for the appellees.

138 KINNE, J. The evidence in this case discloses the following facts: Sophia Shaw, the ancestor of the appellees, on April 17, 1873, conveyed to the plaintiff a lot twenty-three feet front by eighty feet deep in the city of Maquoketa. At the same time, she entered into a written agreement with the plaintiff, granting him the free use, for the purpose of a private alley, of a strip of land seven feet in width from east to west by twenty-three feet in length from north to south, and lying west of and adjoining the lot sold him; said land to be used

in connection with five feet of his own lot. This alley extended, as it appears, over Mrs. Shaw's land, in the rear of the other lots, onto Pleasant street. The plaintiff used the alley without interference or dispute until 1881, when Sophia Shaw sold to C. M. Sanborn the corner lot, and he erected a permanent building thereon, entirely shutting up the end of said alley on ¹³⁹ the street; thereby preventing passage through it from the plaintiff's place to Pleasant street.

In June, 1881, the plaintiff brought suit against Sophia Shaw, and in his petition set out the purchase of the lot; the granting of the alley furnishing passageway to Pleasant street; averring the performance of all the conditions agreed to by him in said written contract granting said alley; averring the sale by Sophia Shaw to Sanborn of a part of said alley, extending north from Pleasant street to the north line of the premises owned and occupied by Sanborn; that Sanborn had begun the erection of a brick dwelling thereon, had shut up said alley, thereby cutting the plaintiff off from all means of passing from Pleasant street, or any other public street, to the rear of his premises, except by passing over adjacent land of Mrs. Shaw; and that she, by her said acts, had rendered the grant of the alley made to him useless. The petition also averred that the plaintiff had suffered great loss and damage in depreciation of the actual and rental value of his premises. He prayed that Sanborn's building might be abated as a nuisance, or that Mrs. Shaw might be ordered by the court to fix and establish for the plaintiff's use a new, suitable, and sufficient way or means of access across her adjoining land from Pleasant street to the west or rear end of his premises, and demanded judgment for two thousand dollars damages. Some other allegations were made, which, in view of the evidence in this case, need not be stated. The defendant Sophia Shaw answered the petition, admitting the plaintiff's purchase of his lot, and the execution of the deed therefor; also admitting the execution of the written agreement, the making deed to Sanborn, and his erection of a building; averring that the plaintiff had forfeited his rights under the grant of the alley by failing to perform certain conditions not necessary to be stated here. The plaintiff filed a reply, ¹⁴⁰ in substance denying the allegations in Mrs. Shaw's answer. The cause was tried to the court on April 6, 1882. The finding was generally for the plaintiff, and a judgment was rendered against the defendant for two hundred dollars and

costs, which judgment was never appealed from, and was paid by Mrs. Shaw. Sanborn was not made a party to this action.

In 1887 Mrs. Shaw died intestate, and the defendants are her children and heirs at law. Austin F. Shaw died during the pendency of the present suit, and the other defendants, prior to his death, acquired his interest in the real estate in controversy. In 1889 the defendants, being the owners of the land lying west of Sanborn, the plaintiff, and others, laid out a public alley sixteen feet wide, running to the rear of the plaintiff's lot, but with a strip of land thirty-three feet wide between this new alley and the private alley granted to plaintiff. Thus this new alley left about thirty-three feet of ground back of the plaintiff's lot and the adjoining lots, and lying between the new and old alleys. The portion of this strip of thirty-three feet lying in the rear of other lot-owners was sold by the defendants to such lot-owners, thereby extending their lots back to the new alley, they paying therefor from thirty-five dollars to fifty-five dollars each, but a much larger sum was asked the plaintiff.

The defendants began preparations to erect a building on the thirty-three feet in the rear of the plaintiff's building, and between it and the new alley, and on September 4, 1889, the plaintiff began this suit, alleging the agreement of Mrs. Shaw to give him the private alley; the location and situation of his property with relation to the old alley and the adjacent streets; the representations of Mrs. Shaw, made to him at the time he purchased his lot, that she had laid out and dedicated an alley in the rear of all the lots adjacent to him, and reaching to Pleasant street; the written ¹⁴¹ grant of the alley; the bringing of the former suit, and its result; that he had had since said suit, and up to 1889, free access to the rear of his lot from Pleasant street over Sophia Shaw's land; setting out the laying out of the sixteen-foot alley before mentioned; that the defendants asked an exorbitant price for the strip of land back of his building to the sixteen-foot alley; that they proposed to erect a building on said piece of ground in the rear of his lot, which would work him great injury; and demanding that it be determined that the plaintiff has an alley right in the sixteen-foot alley; with free access to the same over land between his lot and said alley; praying for a temporary injunction restraining the defendants from interfering with said right, and for other relief; also asking one thousand dollars damages for the

interference with his alley rights. The defendants admitted the purchase of the lot from Sophia Shaw; the written agreement granting an alley; the bringing of the suit in 1881; that they had laid out the sixteen-foot alley and sold ground as alleged; that they intended to erect a building as claimed, and denied all other allegations of the petition. The defendants pleaded the former suit of 1881, as a prior adjudication; also, the statute of limitations. The plaintiff, replying, admits that the pleadings and record attached to the answer are correct, but denies that they have the force and effect claimed by the defendants. In an amendment the plaintiff claims that the action begun in 1881 resulted in his favor, and that the defendants are estopped thereby, as well as by the original agreement, from denying or abridging the use or exercise of the plaintiff's rights. The defendants deny the allegations of the amendment. The court dismissed the plaintiff's bill, and he appeals.

1. The question for our determination is, were the matters pleaded in this action by the plaintiff ¹⁴² adjudicated in the suit brought by him against Mrs. Shaw in 1881? In the case at bar it appears that there was a total breach of the contract. It was so treated by the plaintiff in the former action. He therein prayed that Sanborn's building, which closed up the alley, might be abated as a nuisance, or that the defendant, by an order made by the court, should be compelled to open, fix, and establish a new and sufficient way or means of access across her adjoining land to the rear end of his premises; and also prayed for damages. In the present action he asks the court to determine that he has an alley right in the sixteen-foot alley, which lies thirty-three feet away from him, and wants the defendants enjoined from interfering with his access to it by building thereon, and claims damages. The plaintiff's present claim, if he has any, is based upon the original agreement for an alley immediately in the rear of his building. That right was litigated in the former action. He recovered damages thereon, and he cannot be heard to relitigate his right to a new way over the defendants' land. That was one of the things in issue in the former action. In that action, also, he expressly pleaded, not only damage to the rental value of his building, but the depreciation in the actual value of his premises. The plaintiff is in this action asking damages, and also a way across the defendants' land to the new alley. The court on the

former trial found generally for him. He then asked for a convenient way over the defendants' land, and his prayer was not granted. It is said in *Hahn v. Miller*, 68 Iowa, 748: "The same evidence which would establish his right of recovery in this action would also have established his claim in the former case, and the most infallible test as to whether a former judgment is a bar is to inquire whether the same evidence will maintain both the present and the ¹⁴³ former action": See, also, *Stodghill v. Chicago etc. Ry. Co.*, 53 Iowa, 341; *Goodenow v. Litchfield*, 59 Iowa, 226; *Bettys v. C. M. & St. P. Ry Co.*, 43 Iowa, 602. It cannot be doubted that the action in 1881 was, in law, between the same parties, and in relation to substantially the same subject matter. The former judgment not only concludes the parties as to the matters actually in issue, and decided therein, but also as to all matters which they might have litigated. This is too well settled to need a citation of authorities: *Stodghill v. Chicago etc. Ry. Co.*, 53 Iowa, 341, and cases cited. And it is held, that "where the parties are the same, the legal effect of the former judgment as a bar is not impaired, because the subject matter of the second suit is different, provided the second suit involves the same title, and depends upon the same question": *Doty v. Brown*, 4 N. Y. 71; 53 Am. Dec. 350; *Burt v. Sternburgh*, 4 Cow. 559; 15 Am. Dec. 402; *Aurora v. West*, 7 Wall. 82. The fact that the court in the former action found generally for the plaintiff, but only gave him a judgment for damages, was, in effect, an adjudication that he was entitled to no other relief: Freeman on Judgments, sec. 272; *Thompson v. McKay*, 41 Cal. 221; *Goodenow v. Litchfield*, 59 Iowa, 226. These matters which were, or might have been, pleaded in the former action must be now treated as adjudicated.

2. It is contended that this is a case where the damages are continuing, and that successive suits may be brought; that the plaintiff's rights are based upon contract, and hence the rule as to original damages does not apply. The rule referred to is thus stated: "Whenever the nuisance is of such character that its continuance is necessarily an injury, and where it is of a permanent character that will continue without change from any cause but human labor, then the damage is an original damage, and may be at once fully compensated": ¹⁴⁴ *Town of Troy v. Cheshire R. R. Co.*, 23 N. H. 83; 55 Am. Dec. 177; *Powers v. City of Council Bluffs*, 45 Iowa, 652; 24

Am. Rep. 792, and cases cited. The reason of the rule is, that the cause of the damage is permanent in character; that, unless interfered with by the hand of man, it will continue indefinitely, and hence damages, whether past or prospective, can be estimated, and in such cases successive actions cannot be brought. Applying this rule to the facts in this case, we find that at the time the plaintiff instituted his former action, the alley in the rear of his building, at the point where it reached the street, was totally obstructed by a permanent brick building then in course of erection; that the plaintiff alleged in his petition that said obstruction rendered the alley "impassable for any purpose." There was then an entire breach of the contract, for which the plaintiff might have recovered damages, whether past or prospective. We cannot accede to the doctrine that the rule as to original damages is confined to cases of trespass or torts: *Bowe v. Minnesota Milk Co.*, 44 Minn. 460. Not only was there in fact a total breach of the contract at the time the plaintiff began his former action, but the plaintiff so treated it. He asked that Sanborn's building, which closed the alley, might be abated as a nuisance, or that the plaintiff should, by an order of court, have a new and sufficient way or means of access across Mrs. Shaw's adjoining lands to reach the rear end of his building; and also asked damages. In view of the fact that he did not make Sanborn a party, and that he did not appeal from the former judgment, we may well assume he considered the contract at an end, so far as securing to him the free use of the alley was concerned, and sought for damages for the breach of the contract.

Our view of the case renders it unnecessary to discuss other questions raised. The decree of the district court is affirmed.

JUDGMENTS—ESTOPPEL—TEST OF.—The test whether a former judgment is a bar generally is, whether or not the same evidence will sustain both the present and former action: *Gayer v. Parker*, 34 Neb. 643; 8 Am. St. Rep. 227, and extended note; *Bell v. Merrifield*, 109 N. Y. 202; 4 Am. St. Rep. 436; *Gallaher v. Moundville*, 34 W. Va. 730; 26 Am. St. Rep. 942, and note. See, also, the note to *Flippen v. Dixon*, 29 Am. St. Rep. 656.

NUISANCES—DAMAGES FOR—WHEN ALL RECOVERABLE IN ONE SUIT.—Where nuisances are of a permanent character, a single recovery may be had for the whole damages resulting from the act: *Denver City Irr. etc. Co. v. Middaugh*, 12 Col. 434; 13 Am. St. Rep. 234, and note; *Joseph Schlitz Brewing Co. v. Compton*, 142 Ill. 511, 14 Am. St. Rep. 92, and note. See the extended notes to *St. Louis etc. Ry. v. Biggs*, 20 Am. St. Rep. 177, and *Cooke v. England*, 92 Am. Dec. 628, 630.

BIGELOW v. HOOVER.

[85 IOWA, 161.]

ACCRETIONS.—Though an island is not designated on the government plats, yet, if it in fact exists, a purchaser of the adjacent land is not entitled to the island as an accretion.

ACCRETIONS.—AS BETWEEN AN ISLAND IN A RIVER retained by the government and the purchasers of land fronting on the river subsequent accretions must be divided. It cannot be held that the whole of the accretions belong to the mainland and no part to the island.

ACTION to establish and quiet title to certain land, and to recover damages for rents and waste to what is now called "Hoover's island." The plaintiff, being the owner of lot 1 in section 31, and lot 4 in section 33, claimed that this island belonged to him as an accretion to those lots. The defendants admitted the plaintiff's ownership of lots 1 and 4, but claimed that Hoover's island belonged to the United States; that one Coombs had taken possession of it, intending to enter it under the pre-emption and homestead laws; that he had assigned his right of pre-emption, and it had been acquired by defendants by successive assignments, and that they had continuously occupied the land for eighteen years last past, intending to perfect their title under the homestead or pre-emption laws as soon as the land is open for that purpose. The trial court found that the accretions in question were adjacent to the island, plaintiff's lots, and to other property, and decreed a division of such accretion between the island and plaintiff's lots in a manner specified in its final decree. The plaintiff appealed.

J. S. Lawrence and J. H. Quick, for the appellant.

John W. Weaver, for the appellees.

162 GIVEN, J. 1. The case having been tried below as an equity cause, without objection, it will be so considered on this appeal. This is not a contest between titles. The inquiry is simply whether the plaintiff has title, or, in other words, whether what is now known as "Hoover's island," or any part thereof, is a part of the plaintiff's lots by reason of being accretion thereto. It is difficult to express accurately in words the present shape and condition of the island, but the following will be sufficient for the purposes of the case: It is a pear-shaped body of land, with the neck or narrow end pointing southwest, towards the channel of the Missouri river.

It is entirely surrounded by the waters of Brown lake, and separate from all other land, except the plaintiff's lots, which adjoin the neck or ¹⁶³ narrow point on the east and west sides thereof. The island has been occupied for a number of years, and is now resided upon by the defendants; a considerable portion thereof being available for cultivation, portions of the surface being quite elevated and entirely above high-water mark. The plat of the government survey made in 1851 does not show any island, but marks the space where the island now exists as "bayou." The testimony of a number of witnesses familiar with the locality shows, however, that an island did exist there prior to that survey, and the size and age of trees shown to have been cut from that land leaves no doubt in our minds but that an island existed there at and before the survey. No doubt it was much smaller and less noticeable than now. The testimony is reconciled by the conclusion that the island, as it then existed, was not deemed of sufficient importance to survey or plat. We conclude that, notwithstanding what appears in the government plat, the island did exist at the time of the survey as a separate and distinct body of land from the plaintiff's lots, and the plaintiff is not, therefore, entitled to the whole island as accretion to his land.

2. It is evident that, since the government survey, land has been formed by accretion between what was then the island and the plaintiff's lots. The ownership and title to the island being in the government, it is entitled to additions thereto by accretion the same as if it were owned by an individual: *Benson v. Morrow*, 61 Mo. 345, a case similar in its facts to this. It surely cannot be said that this alluvion that was gradually deposited against this island and the plaintiff's lots belongs entirely to the one or the other. In such cases the additions to the lands must be divided, and this the district court did in its decree, with marked care and due regard to the rights of the plaintiff.

¹⁶⁴ 3. Appellees move to tax the costs of certain parts of the abstract to the appellant, on the ground that they are redundant, and immaterial on this appeal. An examination of the abstract leads us to the conclusion that there are twelve pages thereof that were entirely unnecessary to be set forth, and should not have appeared in the abstract. The motion will be sustained, and appellant taxed with the costs of these twelve pages, at one dollar per page.

In view of the conclusion reached on the merits, appellees' motion to dismiss need not be noticed. The decree of the district court is affirmed.

ACCRETIONS.—This subject is thoroughly discussed in the extended note to *Coulthard v. Stevens*, 35 Am. St. Rep. 307-313, but in connection with the principal case, see especially page 312 of this note, where the question as to when islands and bars may be held as accretions is discussed.

BAXTER v. MYERS.

[85 IOWA, §28.]

JUDGMENT, PARTIES BOUND BY.—A PLAINTIFF WHO DIRECTS THE LEVY OF A WRIT AND ASSUMES THE MANAGEMENT OF THE DEFENSE of the sheriff, when sued for such levy, is bound by the judgment, and estopped from further contesting any issue necessarily litigated and determined thereby.

JUDGMENT—ESTOPPEL.—If, in an action to recover personal property levied upon under execution, the transfer of the plaintiff is attacked as being made to defraud creditors, and after a trial on the merits is adjudged not to be fraudulent nor void, its validity cannot be assailed in a subsequent equitable suit to subject to execution real property included in the same transfer. It is not essential that the title to the property should be expressly involved in the former action. It is sufficient that the main question presented in the first action is necessarily involved in the second.

W. A. Helsell, for the appellants.

Warren and Buchanan, and H. S. Bradshaw, for the appellees.

329 ROBINSON, C. J. In September, 1888, one Williamson obtained in the district court of Ida county a judgment against the defendant John Myers. From that judgment an appeal was taken to this court, and a *supersedeas* bond was given, which was signed by J. W. Reed, as surety. The judgment of the district court was affirmed, and judgment was rendered against Reed on the bond. Execution was issued on the judgment, and was by the sheriff of Ida county levied upon certain personal property as the property of John Myers. Thereupon the defendant Sarah Myers, the wife of John, brought an action against the sheriff to recover possession of the property he had taken under the execution. She alleged in her petition that she was the absolute and unqualified owner of the property, and that she acquired such ownership by purchase. The answer of the sheriff denied the ownership

claimed, and alleged that on or about the seventh day of January, 1889, John Myers, for the purpose of hindering, delaying, and defrauding his creditors, without any valuable consideration, and to prevent the collection by Williamson of the amount due him, and to prevent the collection of any judgment which might be rendered by this court, made a pretended and fraudulent sale of the property to his wife; that the sale and conveyance to the wife were void, and that his detention of said property under the execution was not wrongful. The issues thus presented were tried by the district court of Ida county, and determined in favor of the wife in October, 1889. It appears that this action and ³³⁰ that were commenced at about the same time. The petition in this case recites the levy of the execution upon a part of the personal property which the sheriff seized, and also upon certain land, and alleges that the plaintiffs are the owners of the judgment against Myers; that the property so levied upon was claimed by Sarah Myers by virtue of certain conveyances thereof, made to her by her husband, and that they were without valuable consideration, and made to hinder, delay, and defraud the creditors of John Myers. Mrs. Myers denies the alleged want of consideration and fraud, and alleges that the validity of the conveyances was adjudicated, and that they were held to be valid in her action against the sheriff. It thus appears that the two actions grew out of the same levy, and that the parties claiming under the execution relied upon precisely the same facts to sustain the levy.

1. In an opinion filed on a former submission of this case it was held that the plea of former adjudication was not sustained. On an application for rehearing we were led to believe that the record had not been fully understood, and a rehearing was ordered, and the cause again submitted. It appears that after the sheriff received the execution, and before the levy was made, the judgment in favor of Williamson was assigned to the plaintiffs to protect J. W. Reed, who is a member of that firm. After that time the plaintiffs directed the levy to be made, and when the action was brought against the sheriff, employed attorneys and assumed the management of the defense for him. On the trial they were represented by Reed as well as by the attorneys they had employed. The plaintiffs were, therefore, the real, though not nominal, defendants, and were bound by whatever was adjudicated in

that action: *Stoddard v. Thompson*, 31 Iowa, 80; *Marsh v. Smith*, 73 Iowa, 295; *Bellows v. Litchfield*, 83 Iowa, 36.

³³¹ It is insisted, however, that the particular matters in controversy in this action were not necessarily tried and determined in the action against the sheriff, and that the court did not have jurisdiction in that action to determine the question involved in this. It appears clearly that the transfer of the real and personal property in question was effected at one time for the purpose of paying a claim made by the wife against the husband, and that the transfer constituted a single transaction. Therefore, when it was determined in the case against the sheriff that the conveyance of the personal property was valid, it was necessarily decided that the entire transaction was legal, and it was not essential that the title to the real estate should be expressly involved in that action in order that the adjudication should apply to it. It is true the action against the sheriff was an action of replevin, and the equitable powers of the court were not invoked. But the jurisdiction of the court in which the action was determined was ample to have granted any equitable relief in regard to both real and personal property to which the sheriff or his principals could have shown themselves entitled; and the case of *Gordon v. Kennedy*, 36 Iowa, 169, cited by the appellee, is not in point. In *Wright v. Mahaffey*, 76 Iowa, 100, and *Boyle v. Maroney*, 73 Iowa, 73, 5 Am. St. Rep. 657, it was held that real estate of the debtor, the title to which is in another, cannot be reached by the process of garnishment, but that rule does not apply to this case. The plaintiffs have once had all matters in regard to the validity of the conveyance in question fully investigated in a court of competent jurisdiction, and are bound by the result in that case: See *Newby v. Caldwell*, 54 Iowa, 103; *Stapleton v. King*, 40 Iowa, 283; *Hanna v. Read*, 102 Ill. 596; 40 Am. Rep. 608; *Board of Supervisors v. Mineral Point R. R. Co.*, 24 Wis. 123; *Castle v. Noyes*, 14 N. Y. 329; *Merriam v. Whittemore*, 5 Gray, 317; *Freeman on Judgments*, sec. ³³² 253. A notice of appeal was served by the sheriff, but no *supersedeas* bond has been filed, and the judgment is in full force, and, as far as appears, is final.

2. The defendant John Myers filed an answer which contained a counterclaim. A demurrer to the counterclaim was sustained, but we do not understand that he asks any relief in this court on that account if the decree of the district court as to the validity of the transfer of property made by him is

reversed. For the reason shown, the decree of the district court is reversed.

JUDGMENTS—PARTIES NOT OF RECORD, WHEN BOUND BY.—To bind one not a party of record by a former judgment it is essential that he should have openly intervened in the former suit, assuming its direction and control, to the knowledge of the opposite party, for the prosecution or defense of some interest in the subject of the suit, or to avoid a liability he may be under to indemnify the defendant against an adverse judgment: *Central Baptist Church v. Manchester*, 17 R. I. 492; 33 Am. St. Rep. 893, and note; *Cannon River Mfrs. Assn. v. Rogers*, 42 Minn. 123; 18 Am. St. Rep. 497. See the extended note to *Hill v. Bain*, 2 Am. St. Rep. 876, and the note to *Sauls v. Freeman*, 12 Am. St. Rep. 199.

JUDGMENTS—CONCLUSIVENESS AS RESPECTS THE SUBJECT MATTER DECIDED.—To constitute a judgment in one suit a bar to a second suit it must appear that some issue in the second suit was a material issue in the first suit, and necessarily determined therein: *Huntley v. Holt*, 59 Conn. 102; 21 Am. St. Rep. 71, and note; *Liddell v. Chidester*, 84 Ala. 508; 5 Am. St. Rep. 387; *Bell v. Merrifield*, 109 N. Y. 202; 4 Am. St. Rep. 436, and note. A judgment is conclusive if on a direct point, though the object of the suits is different: *Gallagher v. Moundsville*, 34 W. Va. 730; 26 Am. St. Rep. 942, and note. The doctrine of *res judicata* is limited to matters involved in the litigation, but is equally applicable whether the point decided is of itself the ultimate vital point or only incidental, if still necessary to the decision of that point: *Wright v. Griffey*, 147 Ill. 496; 37 Am. St. Rep. 228, and note.

RICHARDS v. MONROE.

[85 IOWA, 359.]

PRACTICE—TRANSFERRING CAUSE TO EQUITY.—The defense of fraud and want of consideration in an action on a promissory note, and that plaintiff purchased with notice thereof is triable at law, and does not require the cause to be transferred to equity.

EVIDENCE.—TESTIMONY AS TO WHAT THE PAYEE OF A NOTE SAID to the maker before and, at the time, it was executed is admissible to show fraud.

EVIDENCE—CONSPIRACY.—If the defense of fraud and want of consideration is interposed to an action on a promissory note, and that the payee and the first indorser conspired to perpetrate a fraud upon the defendants, and defendants seek to charge the plaintiff with notice through such indorsee, his acts and declarations at the time when he held the note are admissible as tending to show such conspiracy.

EVIDENCE OF THE AMOUNT PAID BY PLAINTIFF FOR A PROMISSORY NOTE is admissible, under the code of Iowa, declaring that if a note is procured by fraud, the plaintiff, though a purchaser for value, without notice of the fraud, is not entitled to recover a greater sum than he has paid with interest and costs.

NEGOTIABLE INSTRUMENTS.—NOTICE OF FRAUD OR WANT OF CONSIDERATION in a negotiable instrument is not implied from such knowledge and

information as would put a man of ordinary prudence upon inquiry to ascertain the truth of the matter. The right of a *bona fide* holder, in the usual course of business, cannot be divested by proof that he was negligent and omitted to make inquiries which common prudence would have dictated.

Samuel Holmes, for the appellant.

W. W. Morgan, for the appellee.

³⁶¹ GIVEN, J. 1. The appellant contends that it was error to overrule his motion to transfer the case to equity. The issues joined are upon the allegations of fraud and want of consideration in the note, and whether the appellant purchased it, for value, before due, without notice of the alleged fraud and want of consideration. These are triable at law. There was no demand for a reformation of either the note or contract, or for any other equitable relief. The motion to transfer was properly overruled.

2. The appellant complains of the admission of certain testimony over his objection. The defendants were permitted to testify to what Tyner said to them before and at the time they executed the note. This was admissible, not to vary or contradict the writings, but to show the fraud alleged.

³⁶² 3. The defendants were also permitted to testify to a conversation with Taylor, to whom Tyner assigned the note at a time when Taylor held it. It is charged in the answer that Tyner and Taylor had conspired to perpetrate the alleged fraud upon the defendants, and it is sought to charge the appellant with notice through Taylor. Under these circumstances the acts and declarations of Taylor were admissible as tending to show the conspiracy.

The appellee Watkins, having executed the note by his mark, being asked, "You did n't sign the note that is sued on, did you?" answered, "No, sir." The appellees contend that, as the execution of the note was admitted, this was prejudicial, and should have been withdrawn. Evidently, the witness meant by his answer that he had not written the name, as later he stated: "We signed the note. I got some one to sign my name. Told him to sign it, or make my mark." No question was made or submitted as to execution of the note, and no misunderstanding or prejudice could have arisen from the statement complained of.

William Green was permitted to testify to what Taylor said to him in the absence of the appellant, as to the way he

and Tyner were doing business in handling territory and notes. This was admissible, as tending to showing the alleged conspiracy and fraud in connection with other testimony tending to show notice thereof to appellant.

4. The defendants were permitted to show by the appellant, over his own objection, what amount he paid for the note, namely, fifty-five dollars. Thereupon the appellant was asked by his own counsel, "What costs and expenses are there attached to this suit on this note?" also, "What costs has this suit occasioned you?"—to both of which appellees' objections were sustained. Under section 2114 of the code, as amended by chapter 90 of ³⁶³ acts of the twenty-second general assembly, if this note was procured by fraud from the defendants, the plaintiff, though a purchaser for value before due, without notice of the fraud, would not be entitled to recover thereon a greater sum than he had paid for the note, with interest and costs. In view of this statute it was competent for the appellees to show the amount paid for the note. Costs here referred to are the taxable costs in the case, and are not required to be proven. The interest to which the appellant might be entitled was a mere matter of calculation from the amount paid. We see no error in these rulings of the court.

5. After all the testimony was introduced the appellant moved for a verdict, for the reason that no defense had been proven. There was evidence tending to show the fraud and want of consideration alleged, and that the plaintiff purchased with notice. The case was therefore properly submitted to the jury. As under section 2114 of the code the plaintiff would be entitled to recover the amount paid by him for the note, with interest and costs, if he purchased without notice, even though the fraud existed, it would have been proper to have submitted the case to the jury, in the absence of evidence of notice.

6. The court instructed the jury that "you should not consider any matter, statement, or declaration not introduced in the evidence admitted in the trial, or fairly applicable thereto." It is contended that this permitted the jury to consider matters not in the evidence, or admitted, if fairly applicable. We think the jury would not so understand the instruction. Its fair construction is that the jury were not to consider any matter, statement, or declaration not in the evidence or admitted, and only such thereof as were fairly appli-

cable to the case. ³⁶⁴ If a matter was proven or admitted that was not fairly applicable to the case it was not entitled to consideration. There was no error in instructing that the alleged fraud might be inferred from all the circumstances.

The court instructed that, to defeat the plaintiff's recovery, it must appear that Tyner obtained the note through fraud as alleged, and that the plaintiff had notice thereof before he purchased; that, if both these matters were established, they should find for defendants, "but if you fail to find one or both of said facts, you should find for plaintiff." This is a correct statement of law applicable to the case. The construction given to the written contract in the sixth paragraph of the charge is correct.

7. It appeared in evidence that near the time at which the plaintiff purchased the note in suit he purchased another note from Taylor, executed by one English to Tyner, and that English had told him that he had not received any machines. The court instructed that, if this conversation was after the plaintiff purchased the note in suit, they should disregard the evidence. We fail to see any ground for complaint on the part of the appellant.

8. The eighth paragraph of the charge is as follows: "8. If you find from the evidence that the plaintiff obtained said note before due, for value, without notice of defendants' alleged defense of failure of consideration and fraud, and what is meant by 'notice' is that plaintiff did not have such knowledge or information as would put a man of ordinary prudence upon inquiry to ascertain the truth of the matter alleged. For, unless such notice is shown, the presumption arises that plaintiff purchased said note in good faith, if it shall appear that the alleged purchase was made in the ordinary course of business." This charge, we think, ³⁶⁵ must be construed as laying down the rule that when a purchaser of a negotiable promissory note for value, before due, has such knowledge or information of infirmities in the note as would put a man of ordinary prudence upon inquiry, to ascertain the truth of the matter, he will be held to have notice. Such is certainly not the rule in this state. "The early and present doctrine is, that the right of a *bona fide* holder for value, in the usual course of business of negotiable paper, cannot be defeated by proof that he was negligent, and omitted to make inquiries which common prudence would have dictated": *Lake v. Reed*, 29 Iowa, 258; 4 Am. Rep. 209,

Lane v. Evans, 49 Iowa, 156. In *Pond v. Waterloo Agricultural Works*, 50 Iowa, 596, 600, it is said: "To charge the holder of a negotiable promissory note with notice of infirmities, he must have been guilty of something more than mere negligence in taking the note. Indeed, gross negligence, it is said, is not sufficient, and that nothing but fraud is sufficient to destroy the character of the holder as one who acted in good faith." In *Cook v. Weirman*, 51 Iowa, 561, 564, it is said: "The rule in England now appears to be that even gross negligence will not necessarily defeat a recovery, and will do so only where it is such as to evince actual bad faith. In this country the decisions have not been entirely uniform, but the weight of authority is probably in accordance with the later English rule." It will be seen, in the light of these authorities, that the instruction given was not in accordance with the rule as held in this state. The exception to this instruction presents directly the question what the rule is in such cases. In *Merrill v. Hole*, 85 Iowa, 66, the question was as to the admissibility of certain testimony.

The appellant's further contention is, that the verdict is contrary to the law and the evidence. As for the error just mentioned, the case must be reversed; we need not consider this last claim of the appellant.

Reversed.

NEGOTIABLE INSTRUMENTS—FRAUD—AMOUNT OF RECOVERY BY BONA FIDE PURCHASER.—A bona fide purchaser of a negotiable instrument, who pays less than its face value, is entitled to recover its face with interest, though it was procured by fraud: *Kitchen v. Loudenback*, 48 Ohio St. 177; 29 Am. St. Rep. 540; *Williams v. Huntington*, 68 Md. 590; 6 Am. St. Rep. 477. The contrary doctrine to the above is maintained in the following cases: *Petty v. Hannon*, 2 Humph. 102; 36 Am. Dec. 303; *Faulkner v. White*, 33 Neb. 200; and *Stalker v. McDonald*, 2 Hill, 93; 40 Am. Dec. 389. A transferee of an invalid note is entitled to recover from the transferor the amount paid for the same, when ignorant of its defects: *Persons v. Jones*, 12 Ga. 371; 68 Am. Dec. 476. The cases on this subject are collected in the extended note to *Bedell v. Herring*, 11 Am. St. Rep. 321.

NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASERS—NOTICE, WHEN NOT IMPLIED.—The purchaser of a negotiable instrument before due, in the usual course of trade, for a valuable consideration, is entitled to enforce it, though he took it under circumstances that ought to have excited the suspicions of a prudent and reasonable man, unless the circumstances further show that he acted in bad faith: *Kitchen v. Loudenback*, 48 Ohio St. 177; 29 Am. St. Rep. 540; *Phelan v. Moss*, 67 Pa. St. 59; 5 Am. Rep. 402; *Mayes v. Badger*, 34 N. Y. 247; 90 Am. Dec. 691, and extended note; *Breckenridge v. Lewis*, 84 Me. 349; 30 Am. St. Rep. 353; *Hansen v. Hoffman*, 5 Wash. 792. *Contra*: See *Rublee v. Davis*, 33 Neb. 779; 29 Am. St. Rep. 509. Notice

to the purchaser of a bill of prior equities between the previous parties thereto, if sufficient to put a prudent man on inquiry, subjects his title to those equities: *Russell v. Haddock*, 3 Gilm. 233; 44 Am. Dec. 693, and note. See, further, the extended note to *Bedell v. Herring*, 11 Am. St. Rep. 313.

PENNINGTON v. PACIFIC MUTUAL LIFE INSURANCE COMPANY.

[85 IOWA, 468.]

INSURANCE AGAINST ACCIDENT WHICH IT IS STIPULATED SHALL NOT COVER INJURIES, OF WHICH THERE IS NO VISIBLE EXTERNAL MARK upon the body of the assured, covers an accident of which there was no visible mark at the time of the injury, if there was such a mark afterwards and as a result of such injury.

INSURANCE AGAINST ACCIDENT—TOTAL LOSS OF BUSINESS TIME, WHAT IS. If a policy provides that if an accidental injury creates a disability the assured shall be paid a certain sum per week for the immediate, continuous, and total loss of such business time as may result from such injury, he is entitled to recover if his injury is such that he loses his time in the business in which he was engaged when insured, though there are other business pursuits from which the accident would not incapacitate him.

INSURANCE AGAINST ACCIDENT.—NOTICE AND PROOFS OF LOSS ARE NOT REQUIRED TO BE GIVEN OR MADE AT THE HOME OFFICE of the insurer, when the policy declares any claim thereunder is payable at the company's office, in San Francisco, California, or (at the option of the company) at the general agency through which the policy is issued, and the plaintiff had transacted all his part of the business with a general agent of the insurer at Chicago, Illinois, and had, at the instance of such insurer, been examined by a physician designated by such agent.

McDill and Sullivan, for the appellant.

Thomas L. Maxwell, and Copenhaffer and Allen, for the appellee.

469 ROTHROCK, J. 1. The injury for which the plaintiff sought recovery is stated in his petition, in substance, as follows: He was a locomotive fireman in the employ of the Chicago, Burlington, and Quincy Railway Company, with his residence at the city of Creston, and his run over the railroad was from Ottumwa to Creston. While in the line of his duty on a trip he was violently and accidentally injured by the sudden lurching of the locomotive, "while he was in a strained position, attempting to clean the grates of said locomotive, which was part of the duty of said plaintiff as a fireman"; and that by reason of said accident he was greatly injured in his

back, which was so wrenched, bruised, and strained, that he was immediately wholly disabled from transacting any and every kind of business in connection with his occupation. The defense interposed by the answer was based upon several grounds. It will not be necessary to set them out in detail, as they are all involved in the points made by counsel in their argument, and will be noticed in the consideration of the case.

⁴⁷⁰ It is claimed by counsel for the appellant that the verdict of the jury is contrary to the evidence, and that a new trial should have been ordered on that ground. It is sufficient to say of this objection to the judgment that a careful examination of the evidence has led us to the conclusion that the judgment should not be reversed upon this ground. It is apparent from the line of argument of the appellant's counsel that the cause was resisted in the court below, and is presented to this court, at a cost probably equal to the amount involved in the case, on the ground that the plaintiff's claim is a mere sham and pretense, and without merit. That is a feature of the case which we are precluded from determining, because there is a fair conflict in the evidence on every disputed question of fact in the case.

2. We come, now, to certain questions which arise on the face of the policy, and the application for insurance upon which the policy was issued. These instruments are so voluminous that it is impracticable to set them out at length in an opinion. It is provided in the application that the "insurance shall not cover disappearances nor injuries of which there is no visible, external mark upon the body of the insured." It is conceded that there is no evidence that there was any visible mark upon the body of the plaintiff at the very time of the injury. It was a strain, and the immediate effects of the injury would not probably be apparent or visible immediately. The court instructed the jury that it would be sufficient for the plaintiff to show that the injury was visible soon after the accident, and as a consequence of the injury. It is contended that this is an erroneous construction of the contract of insurance, and that there was in fact no evidence that there was any visible mark indicating an injury at any time. We think there was evidence from which the jury ⁴⁷¹ could fairly find that the effects of the strain were visible within a few days after the accident. There is nothing in the clause of the contract above set out which

requires that the effects of the accident shall be visible immediately. Such a construction of the contract would defeat all claims for internal injuries not apparent to the eye at once, and would render such a policy in many cases the means of defeating just claims for indemnity. The contract does not contemplate that there must be bruises, contusions, or lacerations on the body, or broken limbs: See *United States M. A. Assn. v. Barry*, 131 U. S. 100. In our opinion, the instruction complained of was correct.

3. Another objection arising on the face of the contract is raised upon the following grounds: The policy provides that, where the accidental injury creates disability, the defendant shall pay to the plaintiff "the sum of ten dollars per week, not exceeding thirty consecutive weeks, for the immediate, continuous, and total loss of such business time as may result from such injuries." The court instructed the jury upon this feature of the case as follows:

"If you believe from the evidence that plaintiff received an injury as claimed by his petition, and that such injury wholly disabled him, and prevented him from following his occupation, and performing its duties, and resulted in the total loss of his business time, the defendant will be liable to the payment of a weekly indemnity for the period he was so wholly disabled; provided, you further find from the evidence that the plaintiff promptly notified the defendant of his injury, and in all other respects performed his part of the contract with reasonable diligence."

It is claimed that this instruction is erroneous, because by the terms of the policy the plaintiff was not ⁴⁷² entitled to any payment whatever, unless his disability was such that he was unable to do any kind of business. We do not think that the clause of the policy above set out is so broad in its meaning as to defeat a recovery if plaintiff was able to do any kind of business. The whole policy must be examined to determine this question. The plaintiff was insured as a railroad employee engaged in the hazardous business of operating railroad trains. The premium for the insurance was paid by an order on the railroad company. It is recited in the policy that the insured "is by occupation local fireman under classification engineers." The reference to "the loss of such business time" has plain reference to the occupation of the insured, and the loss of time in such business means the loss of time in the business of a fireman. It has no reference to

the whole range of business pursuits. The case of *Lyon v. Railway Passengers' Assur. Co.*, 46 Iowa, 631, relied upon by the appellant's counsel, is not in point. In that case the obligation was to pay for loss of time while the insured was "totally disabled, and prevented from the transaction of all kinds of business." It will readily be seen that the limitation in the policy in the case at bar is not so comprehensive as in the cited case. It is limited in this case to such business as the plaintiff was engaged in at the time he was injured. It is true, that in one of the instructions asked by the defendant, the court did charge the jury that the disability must be such as to prevent the plaintiff from all business of every kind. This was in conflict with the instructions given by the court on its own motion. But the conflict worked no prejudice, as the instruction asked was more favorable to the defendant than the case demanded, and the jury evidently followed the rule announced in the instructions limiting the policy to the loss of time in the business or occupation of the plaintiff.

473 4. Another question presented upon the construction of the written contract is the claim of the appellant that the plaintiff was bound by the contract to give notice and make proofs of loss to the defendant at San Francisco. The basis for this claim is found in the application for insurance, and is as follows: "Any claim made under this policy is payable at the company's office in San Francisco, California, or (at the option of the company) at the general agency through which the policy is issued." This is not a requirement that the notice and proofs of loss shall be made at the company's office at San Francisco. The plaintiff transacted this part of the business with one Herrick, the general agent of the defendant at the city of Chicago. The record contains letters written by Herrick to the plaintiff, in which he designates himself as general agent of the defendant, and there is nothing in the whole record from which it can be implied that it was necessary to give notice or proofs of loss at any other place. On the contrary, the plaintiff made a trip to Chicago at Herrick's request, and, by Herrick's procurement, the plaintiff was examined by two surgeons, one of whom testified as a witness that he was the defendant's surgeon for the state of Illinois, and that he made the examination of the plaintiff in that capacity. In view of these facts, it should be conceded that the plaintiff applied at the proper place for an adjustment of

his claim, and there was no error in the instructions to the jury on this question, nor in admitting in evidence the correspondence between himself and the company's office at Chicago.

5. There are other questions of minor importance. They relate to alleged errors in the rulings of the court on objections made to the introduction of evidence. One of these is that the plaintiff was permitted, in his examination as a ⁴⁷⁴ witness in rebuttal, to state a conversation had with an attorney in Chicago to whom he was taken by the defendant's agents, in which the attorney called the plaintiff a liar, and stated that lawyers in the west did not have any sense, and that he would bulldoze the plaintiff out of his claim. It is claimed that this evidence should have been excluded. The plaintiff filed an additional abstract, in which it is shown that the defendant moved to exclude the evidence, and the motion was sustained. This abstract is not denied. It therefore appears that this evidence was, by order of the court, withdrawn from the consideration of the jury. We do not determine whether the evidence was material.

6. Another objection is made to the refusal to permit a witness to answer a question propounded by the defendant's counsel. The record shows that the witness was afterwards permitted to answer the identical question without objection. The foregoing discussion disposes of every material question in the case, and leads us to the conclusion that the judgment of the district court should be affirmed.

INSURANCE AGAINST ACCIDENT: See the extended notes to *Paul v. Travelers' Ins. Co.*, 8 Am. St. Rep. 765; and *Schroeder v. Crawford*, 34 Am. Rep. 240.

INSURANCE AGAINST ACCIDENT—TOTAL DISABILITY, MEANING OF.—The phrase "total inability to labor," means a total inability to earn a livelihood at any employment, and not at the particular employment at which the member was engaged at the time of his injury: *Baltimore etc. Relief Assn. v. Post*, 122 Pa. St. 579; 9 Am. St. Rep. 147. See, also, the note to *North American etc. Ins. Co. v. Burroughs*, 8 Am. Rep. 218.

SECURITY COMPANY v. GRAYBEAL.

[85 IOWA, 543.]

EVIDENCE—ACCOUNT BOOKS, WHAT ARE NOT.—A book kept by a loan agent showing the date and number of each loan, the name and address of the lender, and the place where the loan is to be paid, a description of the property mortgaged as security, the time when the loan is paid, and date of the remitting of the proceeds of the principal, is not a book of account, and is, therefore, not admissible in evidence in favor of borrower for the purpose of proving the payment of the loan.

PAYMENT.—A LOAN AGENT IS NOT AUTHORIZED TO RECEIVE PAYMENT of a loan payable in another state where the lender resides, and when the agent has not in his hands either the note or the mortgage given to secure its payment.

PAYMENT OF NEGOTIABLE PAPER TO AN AGENT who does not have it in his possession is at the peril of the payor, unless he can prove that the agent had special authority from the owner to receive such payment, or that such agent had been represented by the owner to have such authority.

Kauffman and Guernsey, for the appellant.

Barcroft and Bowen, A. N. Porter, and S. S. Cole, for the appellees.

545 KINNE, J. December 28, 1878, the defendant John T. Graybeal, being the owner of certain land in Polk county, Iowa, made a loan of eight hundred dollars thereon of William Bolles, of Hartford, Connecticut. The loan was to run for five years, and was secured by mortgage on said land, in the execution of which his wife joined. October 28, 1882, said Bolles sold and assigned said note and mortgage to the plaintiff. Some time subsequent to the execution of the mortgage (the exact date does not appear) Graybeal and wife sold the land to the defendant Mally. To the plaintiff's petition for a foreclosure of the mortgage, which is in the usual form, the defendants plead that on June 26, 1883, the defendant John T. Graybeal paid to said Bolles, the then owner of the note and mortgage, eight hundred and sixty-three dollars and thirty-three cents, the amount then accrued thereon. It seems Graybeal made application for the loan to, and procured it through, one Hugh R. Creighton, then a loan agent at Des Moines. After this mortgage had been executed, the defendant Graybeal placed another mortgage on his land, and also became indebted to various parties, some of whom had reduced their claims to judgment. For the purpose of paying off his indebtedness, he made application to said Creighton for another loan of three thousand dollars on the

land, given as security in the former mortgage, as well as upon other lands. This application was made April 28, 1883, and it is claimed by Graybeal that Creighton was to make the three thousand dollar loan, procuring the money wherever he could, and to pay off Bolles and the other mortgages and certain judgments out of the money, and the balance was to be turned over to him. June 26, 1883, it is claimed that Creighton had placed the three thousand dollar application and procured the money, but this is by no means clear from the testimony. Graybeal ⁵⁴⁶ and Porter testify that the arrangement was that the Bolles loan was to be paid immediately on the obtaining of the money on the three thousand dollar loan. It appears that the three thousand dollars was not sufficient to pay all the encumbrances on the land, and the matter was pending unsettled between Graybeal and Creighton for nearly two years, awaiting the raising of enough money by the former to satisfy all the lienholders. As near as can be ascertained from this record, this was accomplished in December, 1884. No settlement, however, was had by Graybeal with Creighton, and June 3, 1885, the latter absconded. Creighton had not paid to Bolles any money on account of his mortgage.

1. To establish the fact that Creighton, in receiving so much of the three thousand dollar loan as was required to pay off the Bolles loan, acted as the agent of Bolles the defendants introduced in evidence Creighton's book, wherein his loans were registered, in which there was an entry indicating the payment of the Bolles loan. The theory on which the loan register was introduced we must presume was that it was a book of account. Our statute provides that "books of account containing charges by one party against the other, made in the ordinary course of business, are receivable in evidence," etc., when the following circumstances appear: 1. "The books must show a continuous dealing with persons generally, or several items of charge at different times against the other party in the same book or set of books." 2. "It must be shown by the party's own oath, or otherwise, that they are his books of original entries." 3. "It must be shown in like manner that the charges were made at or near the time of the transaction therein entered, unless satisfactory reasons appear for not making such proof." 4. "The charges must also be verified by the ⁵⁴⁷ party or clerk who made the entries, to the effect that they believe them just and true; or a sufficient reason must

be given why such verification is not made": Code, sec. 3658. This book was not admissible, for the reason that the preliminary proof required by statute was not made. It was not shown that the book was an account book, or that the charges, if any, therein were made in the usual course of business; nor was a single requirement of the statute as to preliminary proof complied with: *Karr v. Stivers*, 34 Iowa, 123; *Ford v. St. Louis etc. Ry. Co.*, 54 Iowa, 723; *Cummins v. Hull*, 35 Iowa, 253. The book admitted in evidence was so ruled as to show "No. of Loan," "Name of Mortgagor," and "Post Office," "County," "Name of Mortgagee, Post Office, and Where Payable," "Description of Property Mortgaged," "Mortgage Record," "No. of Application," "Date of Loan and Time," "Coupon Nos.," "Principal and Interest, When Due and Paid," "Date Remitted," "Insurance Co. Amount," "Remarks." These constituted headings to the page, under each of which the proper entries could be made. It is clear that such a book has few, if any, of the characteristics of an account book. It contains no charges. It does not show a continuous dealing with persons generally. It is not such a book as the statute contemplates as a book of accounts. It is simply a private memorandum book, kept by Creighton for his own use and convenience in the transaction of his business: *Hancock v. Hintrager*, 60 Iowa, 374; *Fitzgerald v. McCarty*, 55 Iowa, 702; *Van Every v. Fitzgerald*, 21 Neb. 36; 59 Am. Rep. 835; *Pollard v. Turner*, 22 Neb. 366; *Labaree v. Klosterman*, 33 Neb. 150.

2. It is clear to our minds that in procuring the three thousand dollar loan Creighton was the agent of Graybeal. The latter made an application to him for the loan. He was to procure ⁵⁴⁸ the money wherever he could do so, and with its proceeds pay off various liens upon the property; among others, the Bolles loan. He held the fund received on the three thousand dollar loan as Graybeal's agent. Creighton could not, while holding this money as Graybeal's, make it the money of Bolles or the plaintiff, and thus work a payment of the plaintiff's mortgage, except by sending it to the plaintiff, unless the plaintiff or Bolles, knowing that Creighton had the money in his hands, consented to some other application of it, or so acted as in law would amount to a consent that Creighton should retain the money as plaintiff's agent: *Pease v. Dibble*, 57 Ga. 446; *Price v. White*, 70 Ga. 381; *Bradford v. Arnold*, 33 Tex. 412; *Phillips v. Mayer*, 7 Cal. 81.

It does not appear that Bolles or the plaintiff had any knowledge whatever that Graybeal was negotiating the three thousand dollar loan, and neither of them was in any way connected with the transaction.

Furthermore, there is no evidence that Creighton was ever authorized to collect the Bolles loan. It was not yet due, and, so far as Bolles was concerned, there was no occasion to collect it, or to authorize any one so to do. Indeed, it is not claimed that Bolles ever gave Creighton any special authority to collect the loan. It is insisted, however, that the letters which passed between Bolles and Creighton show a general authority to collect all his loans, whether due or not, but the evidence does not sustain this theory. Creighton was conducting an independent business—that of a loan agency: *New England Mortgage Security Co. v. Townes*, 1 South. Rep. 242 (Miss., Feb. 7, 1887). It appears that Bolles at all times, during his dealings with Creighton, reserved and exercised the right of accepting or rejecting Creighton's applications for loans; that in nearly all cases Bolles refused to send notes, mortgages, or interest coupons to Creighton, until the money had ⁵⁴⁹ first been paid to him; and that all these loans were payable at Hartford, Connecticut. October 15, 1882, and prior to the expiration of this loan, Bolles advised Creighton that all his business, including the loan in question, had been placed in the plaintiff's hands. Graybeal testifies that he knew Bolles lived in the east, and that the loan was payable at Hartford. When he paid interest to Creighton he got receipts in Creighton's name. He knew Creighton had to send the interest money east before he could get the interest coupons. He never inquired of Creighton as to whether he had remitted the money for the Bolles loan to Bolles or the plaintiff. He never asked Creighton to surrender to him the Bolles bond and mortgage, nor did he ever ask Bolles or the plaintiff for them. He did not even recollect the name of the party who held the mortgage against him. No one told him that Creighton was acting as agent for Bolles. He never asked for the interest coupons when he paid the interest to Creighton. There is no pretense that Creighton had the Bolles papers in his hands at the time it is claimed the loan was paid. The general rule is well settled that one paying to an agent the amount due upon negotiable paper, when the agent does not have the papers in his possession, does so at his peril: *Haines v. Pohlmann*, 25 N. J. Eq. 179; *Smith v.*

Kidd, 68 N. Y. 130; 23 Am. Rep. 157; *Brewster v. Carnes*, 103 N. Y. 556; Jones on Mortgages, sec. 964; Meham on Agency, sec. 373. And it has often been held that authority of an agent to receive the interest on a note does not authorize one to pay him the principal: Meham on Agency, sec. 379, and cases cited; Jones on Mortgages, sec. 964. This doctrine also finds support in *Fisher v. Schiller Lodge*, 50 Iowa, 459; *Draper v. Rice*, 56 Iowa, 114; 41 Am. Rep. 88. And in *Tappan v. Morseman*, 18 Iowa, 500, the doctrine is thus stated by Judge Dillon: "So that it may be laid down as a general rule that, if a debtor owing money on a ⁵⁵⁰ written security pays to or settles with another as an agent, it is his duty, at his peril, to see that the person thus paid or settled with is in possession of the security. If not thus in possession, the debtor must show that the person to whom he pays or with whom he settles has special authority, or has been represented by the creditor to have such authority, although for some reason not in possession of the security."

The evidence also shows that Graybeal never received the interest coupons from Creighton at the time he paid the interest, and the former says he supposes this was because he had to remit the money to the party holding the bond and coupon before he could get the coupon. It appears from the testimony of witness Porter, who seems to have been assisting Mr. Graybeal in this loan transaction, that in a statement given him for Graybeal in the winter of 1884 by Creighton the latter had charged Graybeal interest on this Bolles loan up to November 17, 1884, a year after Graybeal and Porter claim it was paid by the application of a part of the three thousand dollar loan. True, Porter says he did not examine it, but it clearly indicates that the fact that the Bolles loan had not been paid was called to the attention of Graybeal and Porter by Creighton over a year after he had, as they claim, received the proceeds of the three thousand dollar loan. We have carefully examined all the testimony, and are fully satisfied that Creighton was not, in fact, the agent of Bolles to receive this money; that neither Bolles nor the plaintiff did any thing to induce Graybeal to believe that Creighton was authorized to receive the money on the Bolles loan. There are no facts in this case from which Graybeal had a right to suppose that Creighton had authority to receive the money on the Bolles mortgage. In principle this case is

like *Hippee v. Pond*, 77 Iowa, 236: See, also, *Artley v. Morrison*, 78 Iowa, 132.

The judgment of the court below is reversed.

EVIDENCE.—BOOKS OF ACCOUNT: See *House v. Beak*, 141 Ill. 290; 33 Am. St. Rep. 307, and note; *Anchor Milling Co. v. Walsh*, 108 Mo. 277; 32 Am. St. Rep. 600, and note; and the extended note to *Union Bank v. Knapp*, 15 Am. Dec. 191.

PAYMENT OF NEGOTIABLE INSTRUMENT TO AGENT.—Payment of money due on a written security, to an agent who has neither possession of the security nor express authority to receive such money is not good, and the principal may compel the debtor to pay it again: *Smith v. Kidd*, 68 N. Y. 130; 23 Am. Rep. 157.

MARDEN v. HOTEL OWNERS' INSURANCE CO.

[85 Iowa, 584.]

INSURANCE—CONFLICT OF LAWS.—If an insurance corporation organized and doing business in this state solicits insurance in another, and there receives an application and a premium note which is dated at its home office in this state, to which the note and the application are sent, and from which a policy issues, the contract is deemed to be made here, and is controlled by the laws of this state, and not by the laws of the state in which the property insured is situate.

INSURANCE—NOTICE OF NONPAYMENT OF PREMIUM NOTE.—Under the laws of Iowa, a notice of the nonpayment of premium will not terminate the liability of the insurer, unless it states "that, unless payment is made within thirty days, the policy will be suspended." A notice that the sum unpaid must reach the office not later than the date thereof does not comply with this statute.

INSURANCE.—FORFEITURE FOR NONPAYMENT OF PREMIUM NOTE IS INCONSISTENT with a subsequent demand for the payment of such note and a notice that if not paid suit will be brought thereon.

McDill and Sullivan, for the appellant.

T. M. Stuart and F. Q. Stuart, for the appellee.

585 ROTHROCK, J. It will not be necessary to set out the petition, answer, and demurrer in order to present the questions involved in the appeal. The material facts, as shown by the pleadings, are as follows: The policy, or so much of it as is necessary to be considered, is as follows:

"No. 178.

\$2,500.00.

"The Hotel Owners' Insurance Company, Mutual, of Creston, Iowa, organized in 1889, in consideration of premium note of fifty dollars, on which I agree to pay all sums of money that may be assessed by the directors thereof, not ex-

ceeding the full amount of said note in any one year, do hereby insure O. S. Marden against loss or damage by fire to the amount of twenty-five hundred dollars, only on the property below described [here follows a detailed description of the property, all situated in the town of Kearney, Neb.; application referred to and made a part of this contract], from January 1, 1890, at noon. Policy self-renewing at each anniversary. Payment of premium to be made on demand, according to the terms of the premium note given to secure the issuance of this policy, which note also renews itself at each anniversary of its date. . . . 586 Be it expressly agreed that this company shall not be liable for any loss or damage that may occur to the property herein mentioned while any pledge or assessment given for said insurance, or any part thereof, remains due and unpaid. . . . This contract is made and accepted subject to the above conditions. Witness the seal and signature of the president and secretary of said association at their office in the city of Creston, Iowa, this first day of January, 1890.

GEO. J. DELMEGE,

"Attest: JOHN GIBSON,

"Secretary.

"President."

The plaintiff gave a promissory note for the insurance premium, which note is as follows:

"No. 178.

\$50.00.

"CRESTON, IOWA, January 1, 1890.

"March first, after date, for value received, I promise to pay, to the order of the Hotel Owners' Mutual Fire Insurance Company, at their office in Creston, Iowa, fifty dollars. It is hereby expressly agreed that this note is liable to assessments only for losses and expenses of said company during the life of said policy. Does not bear interest, and is not negotiable. That the cancellation of the policy of even number and date herewith, according to its terms, also cancels this note. That eighty per cent only of the amount of note will be collected annually. This note is given in payment of premium for policy of insurance No. 178, of even date herewith, issued to O. S. Marden by the Hotel Owners' Mutual Fire Insurance Company; and I promise that this note shall renew itself on each anniversary of its date, subject to the payments made and to be made, and paid annually thereafter, on demand on each anniversary of its date, so long as the policy aforesaid, which renews itself, with all its terms and conditions on

the anniversary of its date, shall continue and remain in force.

O. S. MARDEN.

"Witness: George J. Delmege."

⁵⁸⁷ It is conceded that eighty per cent, or forty dollars, of this note became due and payable on the first day of March, 1890. It was not paid when due, and on the tenth day of that month the secretary of the defendant company wrote and mailed a letter to the plaintiff, notifying him that if he did not remit promptly suit would be commenced on the note at once. The plaintiff received said letter, and replied that according to his recollection he was to pay the note April 1, 1890, but that if he were in error about the time, he would remit if the defendant would at once advise him. This letter was written and mailed at Boston, Massachusetts, on March 17, 1890. The property insured by the policy was destroyed by fire on the morning of March 24, 1890, and on the same day the plaintiff telegraphed the sum of forty dollars to the defendant's credit to the Creston National Bank, for the payment of the premium. The money was received by the defendant, and on the same day a receipt therefor was mailed to the plaintiff. The defendant had no knowledge that the property was destroyed when the money was received, and when that fact came to the knowledge of its officers the money was returned to the plaintiff, on the claim made by the defendant that the policy was forfeited, because the premium was not paid when due.

1. It appears that the plaintiff was a resident of Kearney, in the state of Nebraska, and that the defendant is an Iowa corporation, with its principal place of business at the city of Creston. It was not authorized by the laws of Nebraska to insure property in that state. The secretary of the defendant was in the city of Kearney, and solicited the plaintiff to insure his property, and an application was prepared and signed, and the note for the premium executed at that place, and the note and application were sent to the ⁵⁸⁸ home office, at Creston, from which place the policy was issued. The following is one of the grounds of the demurrer: "The policy sued on, and the facts stated in the answer, show that the contract of insurance was made in Iowa; that the money to be paid thereon was to be paid in Iowa; and that it was and is an Iowa contract, and must be construed and enforced as an Iowa contract." We have set out this ground of demurrer

for the reason that in our opinion it is decisive of the rights of the parties. It is strenuously contended by counsel for the appellant that the contract of insurance entered into by the parties is a contract which was made in Nebraska, and that it cannot be controlled or limited by the laws of Iowa. We think that under the facts above set forth the contract was made and completed in this state, and must be controlled by our laws. The note for the premium was dated and made payable at Creston. The policy was executed, dated, and sealed in Iowa. The suit is based upon the policy, and is brought in this state, and the policy is not payable at Kearney, but in this state. All of the acts of the parties indicate that the contract was intended to be made and performed in this state. There was no completed contract in Nebraska. It was a mere verbal arrangement or agreement to issue a policy in Iowa. The policy having been issued in pursuance of the verbal arrangement, the contract was executed and to be performed in this state, and it is to be construed and controlled by our laws: *Arnold v. Potter*, 22 Iowa, 194; *Ruse v. Mutual Benefit Life Ins. Co.*, 23 N. Y. 516; 2 Parsons on Contracts, 582.

2. It remains to be determined whether, under the facts above recited, the policy ceased to be binding upon the defendant under the laws of this state. It is provided in chapter 210 of the acts of the eighteenth general assembly that "within thirty days prior to or at any ⁵⁸⁹ time after the maturity of any note or contract, . . . where the time of payment is fixed in the contract given for the premium on any policy of insurance, such company or association may serve a notice in writing upon the insured that his note, or an installment thereof, is due or to become due, . . . and that unless payment is made within thirty days his policy will be suspended." The defendant did mail a notice to the plaintiff on the first day of February, 1890, stating that the sum of forty dollars should reach the home office not later than March 1, 1890. But the notice was not a compliance with the law, in that it did not state that if payment was not made the policy would be suspended, and the provision in the policy that the defendant "shall not be liable for any loss that may occur while any pledge or assessment given for said insurance, or any part thereof, remains due and unpaid," cannot avail the defendant, because it is expressly provided in the said act of the eighteenth general

assembly that a policy shall not be declared forfeited or suspended for nonpayment of a note or contract for the premium "except as hereinafter provided, any thing in the policy or application to the contrary notwithstanding." As we have seen, one of the requirements of the act is that the notice shall state that, if payment be not made, the policy will be suspended. The statute is absolute, and its provisions must be complied with in order to suspend a policy for the nonpayment of the premium: See *Boyd v. Cedar Rapids Ins. Co.*, 70 Iowa, 325. It is apparent that the defendant did not contemplate a suspension of the policy when the first notice was given, because, after the note became due, and on March 10, 1890, another demand was made, which was in no manner the demand required by statute. Instead of giving notice of a suspension of the policy in the event of ⁵⁹⁰ nonpayment of the premium, it advised the plaintiff that suit would be commenced on the note.

Our conclusion is that the demurrer to the answer was rightly sustained.

Affirmed.

INSURANCE—CONFLICT OF LAWS.—When an insurance company, having its home office in one state, issues a policy upon property situate in another state to a resident thereof, through its authorized agent therein, as provided by the policy, the contract of insurance is deemed to have been made in the state where the property is situated: *Curnow v. Phoenix Ins. Co.*, 37 S. C. 406; 34 Am. St. Rep. 766, and note. To the same effect is *Cromwell v. Royal Canadian Ins. Co.*, 49 Md. 366; 33 Am. Rep. 258. A contract of insurance is executed at the place where the last act is done which is necessary to complete the transaction and bind both parties: *Ford v. Buckeye State, Ins. Co.*, 6 Bush, 133; 99 Am. Dec. 663, and note at page 671.

INSURANCE.—WAIVER OF FORFEITURE FOR NONPAYMENT OF PREMIUM: See the extended notes to *Meyer v. Knickerbocker etc. Ins. Co.*, 29 Am. Rep. 205, and *Wheaton v. North British etc. Ins. Co.*, 9 Am. St. Rep. 234. An unconditional offer by an insurance company to accept at a future time an overdue premium, with a tender of payment in pursuance of such offer, is a waiver of any forfeiture that might have been enforced, because the premium was not paid when due: *Murray v. Home Ben. etc. Assn.*, 90 Cal. 402; 25 Am. St. Rep. 133, and note.

INSURANCE—NOTICE OF FORFEITURE OF POLICY FOR NONPAYMENT OF PREMIUM.—When credit is given by an insurance company for the payment of the premium, it has no right to cancel the policy for nonpayment, except by putting the insured in default and giving him personal notice: *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; 17 Am. St. Rep. 233, and note; *Mallory v. Ohio etc. Ins. Co.*, 90 Mich. 112. See, also, *Savage v. Phoenix Ins. Co.*, 12 Mont. 458; 33 Am. St. Rep. 591.

CRITTENDEN v. SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY.

[85 IOWA, 652.]

INSURANCE—MISTAKE OF LAW.—THE FAILURE TO STATE IN A WRITTEN APPLICATION FOR INSURANCE THAT CERTAIN SHELVING INCLUDED IN THE INSURANCE WAS SUBJECT TO A MORTGAGE cannot avoid the insurance if the agent taking the application was fully informed of all the facts, and the omission to refer to the mortgage in the application was due to the belief of the agent and of the applicant that the shelving was personal property, and therefore not covered by the real estate mortgage.

INSURANCE.—IT IS NOT NECESSARY FOR THE PLAINTIFF TO PLEAD A WAIVER BY THE INSURER of a breach of a condition against the property being subject to mortgage if the defense is that the existence of such mortgage was concealed, and, as a matter of fact, it was not concealed, but was made known to the agent who took the application for the insurance. The mortgage and the failure to notify the insurer thereof constitute an affirmative defense, and no pleading is necessary respecting it on the part of the plaintiff.

INSURANCE—SUBSEQUENT MORTGAGE AND DEED.—The condition that a policy of insurance shall become void if the risk is increased by any means whatever within the control of the assured is not broken by his making a conveyance which is intended and accepted as a mortgage to secure the payment of a loan, unless it is found that the execution of such mortgage did increase such risk.

INSURANCE.—THE PROOFS OF LOSS DO NOT LIMIT THE AMOUNT WHICH MAY BE RECOVERED if they were for too small a sum, and the agent of the insurer prepared such proofs, and there was no fraud or concealment, nor any attempt at fraud or concealment on the part of the assured.

N. M. Pusey, for the appellant.

Wright and Baldwin, for the appellee.

653 GRANGER, J. The district court found the following facts and conclusions:

"1. On the 21st of November, 1883, the defendant issued to J. P. Creager its policy insuring said Creager against loss or damage by fire, for the period of one year, on property and in amounts as follows: Fifteen hundred dollars on his general stock of merchandise, consisting of drygoods, millinery, notions, ready-made clothing, hats and caps, boots and shoes, groceries and provisions, queensware, glassware, crockery, and such other merchandise, not more hazardous, as is generally kept in a general notion store; and six hundred dollars on his store furniture and fixtures, consisting of counters, shelving, showcases, fireproof safe, and all other

usual store furniture and fixtures, all contained in the one-story brick store building situated on lots 1 and 2, in block 21, Logan, Iowa, subdivision of said lots C and D.

"2. The building in which the insured property was contained had been erected by said Creager prior to the issuance of said policy, for his use as a ⁶⁵⁴ general store. The shelving therein (being a part of the property insured) rested upon the floor, and was nailed thereto, and was also nailed to wooden strips imbedded in the walls for that purpose, and was placed in the building by Creager for use therein in connection with the building as a storeroom, although such shelving could be removed without injury to the building, other than the drawing out of the nails which held it in place. The building was a brick structure, permanent, and a part of the realty.

"3. At the time the insurance in question was written, the realty was encumbered by a mortgage to one Charles L. Mark, executed by Creager. The agent of the defendant, who took the application and issued the policy, was informed by Creager at the time of taking the application, and knew of the existence of this mortgage. Both he and Creager supposed it did not cover any part of the property insured, and for this reason no mention was made of it in the application.

"4. On the eleventh day of January, 1884, one G. B. Seekell filed in the office of the clerk of the district court of Harrison county, a mechanic's lien upon real estate, of which the building containing the insured property was a part, to secure a claim of five hundred and sixty dollars and eighty-five cents for lumber furnished by him to said Creager for the construction of said building, and the counters and shelving therein. This claim was unsatisfied at the time of the loss of the property insured.

"5. On the twenty-ninth day of February, 1884, said Creager and wife conveyed the real estate, of which the building containing the insured property was a part, by deed absolute on its face, to one P. Cadwell, and took back an instrument in writing, showing that said deed was executed to said Cadwell, and deposited as collateral security for payment of the debt of two thousand seven hundred dollars, which Creager owed ⁶⁵⁵ to 'Cadwell's bank'; said instruments being parts of one and the same transaction, and together constituted a mortgage of Creager to secure said debt. This encumbrance was unsatisfied at the time of the loss of the property insured.

"6. At the time when the insurance in question was written, the value of the property owned by Creager and covered by such insurance was greater than the total amount of insurance written thereon.

"7. The property insured was totally destroyed by fire on the 8th of August, 1884, and on the same day, and after the loss, the policy of insurance in suit, and all claims under it, were duly assigned by said Creager to A. J. Crittenden, the plaintiff herein.

"8. After the insurance in question was written, and before the loss of the property insured, some negotiations were had between Creager, the assured, and one A. K. Grow, looking to the formation of a partnership between them in the mercantile business then being carried on by Creager. But no copartnership agreement was ever consummated between them, and said Grow never in fact acquired any interest in any part of the property insured.

"9. On the sixteenth day of August, 1884, said Creager, the assured, signed and delivered to the agent of the defendant, who was authorized to receive the same, written proofs of loss, which are in evidence in this cause. These proofs were made up by said agent of the defendant, with the assistance of Creager. Said agent was informed and had knowledge, at the time when said proofs were made, of the existence of the Mark mortgage, and of the deed to Cadwell, and of the assignment of the policy to Crittenden. There was no fraud or concealment, nor any attempt at fraud or concealment, on the part of said Creager, in making of said proofs. The said proofs of loss were incorrect in the following particulars: 1. They represented ⁶⁵⁶ that the insured property was free from any encumbrance. This was true, except as to the shelving in the store building, which, being part of the property insured, was part and parcel of the realty, and as such was covered by the Mark mortgage, and by the Cadwell mortgage, and by the mechanic's lien of Seekell; and 2. They represented the total amount of loss to be four thousand three hundred and three dollars and seventeen cents, when, in fact, the total amount of the loss was much greater than that sum, and was fully equal to the total amount of insurance upon the property.

"And the foregoing, being all of the material facts in the case, the court, as conclusions of law thereon, finds that the policy of insurance in suit was in full force at the time of

the loss of the property insured, and that the plaintiff is entitled to recover the full sum insured thereby, to wit, the sum of two thousand one hundred dollars, with interest on said sum at the rate of six per centum per annum from the sixteenth day of October, 1884."

1. It is provided in the policy that for "any false representations by the assured of the condition, situation, or occupancy of the property, or any omission to make known every fact material to the risk, . . . this policy is void." The policy in terms covers certain shelving and fixtures of the building, as found by the district court; and on the building was a mortgage to one Mark; and it is claimed that "the failure of Creager to make this fact known to the company was the suppression by him of a truth which, under the . . . conditions of the policy, he should have disclosed," and renders the policy without force. The district court found that the facts as to the mortgage were known when the application was made, and that Creager informed the agent, but both supposed that it ⁶⁵⁷ did not cover the property insured; by which we understand that they did not regard the fixtures a part of the realty. Nothing in the conditions of the policy required Creager to become the legal adviser of the company. The most that they required was that he should state the facts, which he did. The mortgage was upon the building, and the fixtures were a part of it. The company was in possession of all the facts known to Creager, and under such circumstances there could be no suppression of the truth.

2. A point is made as to the condition of the pleadings, and that no waiver is pleaded. The answer avers that Creager concealed and kept from the defendant all knowledge of the existence of the mortgage. It is an affirmative defense, and the law makes a denial. The proofs do not sustain the defense. Notice to the agent was notice to the company, and the failure to indorse the encumbrance on the policy was because both the company and Creager were in error as to the law applicable to the facts. This thought is conclusive as to the point urged as to the admissibility of the evidence to show that Creager told the agent of the existence of the mortgage, it being contended that such testimony was inadmissible in the absence of a plea of waiver.

3. On the twenty-ninth day of February, 1884, Creager made to P. Cadwell a deed of the premises, which the court found to have been intended by the parties to it as a mort-

gage, to secure two thousand seven hundred dollars, and the finding has full support in the evidence. It is urged that even as a mortgage it was such a violation of the conditions of the policy as to avoid it. "Condition 1" of the policy provides that, if "the risk be increased by any means whatever within ⁶⁵⁸ the control of the assured" it shall be void. This is the only provision of the policy which we find that can be construed as against subsequent encumbrance. It is a sort of blanket provision, without such specification as to give it legal exactness—that is, to enable the law, from the language used, to define the intent of the parties; as by specifying encumbrances or other facts that would increase the risk, not comprehending, in a literal sense, so much as to indicate that less was really intended. It is not to be known from the language of the policy the particular facts that the parties contemplated would increase the risk. The striking of matches for lighting lamps or fires, increasing the number of fires, increasing the number of lodgers in the building, the changing or increasing of employees, and very many other facts, would increase such a risk, but it is not to be believed that it was contemplated that all of such increases of risk were designed to render the policy void. It was competent for the parties to specify facts that should increase the risk, and where it is not done, but such general language is used, it is, we think, a question of fact for the court whether a particular fact, claimed to increase the risk, was really one that the parties contemplated or not, or, perhaps, whether a particular fact did amount to an increase of the risk. It is likely generally true that an encumbrance that lessens the interest of the assured in the property adds to the risk of the insurer, but collateral facts may vary the rule. The usual custom is to provide in terms, in the policy, against encumbrance, except by permission of the company, and where it is not done, as in this case, we are not prepared to hold, as a matter of law, that the parties designed it. The district court must have found that the encumbrance was not a breach of the conditions, for it found the fact of the encumbrance, and yet sustained the policy.

⁶⁵⁹ 4. There is a claim that there was a partnership formed between Creager and Grow that rendered the policy void. The evidence was in decided conflict on the point, and the finding of the court below concludes us.

5. In the proofs of loss the total amount stated was four

thousand three hundred and three dollars and seventeen cents. On this basis the proportion of the defendant company would be less than the judgment entered below, but the court found the total loss greater than that stated in the proofs of loss, and greater than the aggregate amount of insurance, which would make the defendant company liable for the face of the policy; and that, with interest accrued, is what the judgment is for. It is urged that the proofs of loss should be conclusive as to the amount recoverable. Whatever should be the general rule in this respect, it is sufficient to say that the court found that the agent of the company really prepared the proofs of loss with the assistance of Creager, and that in making such proofs "there was no fraud or concealment, nor attempt at fraud or concealment, on the part of said Creager." If, then, the proofs did not represent the actual loss, no less can be said than that it was a mistake, and no mistake thus made should be permitted to limit a recovery.

The judgment is affirmed.

INSURANCE—MISSTATEMENTS IN POLICY—EFFECT OF KNOWLEDGE OF AGENT.—As to when policies of insurance filled out by the agent of the company are not avoided by misstatements therein, see *Beebe v. Ohio etc. Ins. Co.*, 93 Mich. 514; 32 Am. St. Rep. 519, and note; *Haire v. Ohio etc. Ins. Co.*, 93 Mich. 481; 32 Am. St. Rep. 516, and note; *Mesterman v. Home Mut. Ins. Co.*, 5 Wash. 524; 34 Am. St. Rep. 877, and note; also the extended note to *Wheaton v. North British etc. Ins. Co.*, 9 Am. St. Rep. 230.

INSURANCE—INCREASE OF RISK.—A condition in a policy forfeiting it, if the insured property is so changed as to increase the risk, is not broken by such a change as not only fails to increase the risk but actually diminishes it: *Esch v. Home Ins. Co.*, 78 Iowa. 334; 16 Am. St. Rep. 443.

INSURANCE.—THE INSURED IS NOT CONCLUDED BY THE CERTIFICATE OF THE MAGISTRATE AS TO THE AMOUNT OF LOSS required by the policy to be furnished as part of the proofs of loss, but may, notwithstanding such certificate, establish by witnesses the true amount of the loss: *Birmingham etc. Ins. Co. v. Pulver*, 126 Ill. 329; 9 Am. St. Rep. 598, and note; note to *Kelly v. Sun Fire Office*, 23 Am. St. Rep. 260. Proofs of loss are no part of the insurance contract, and the insured is not estopped from showing that a statement in the proofs is a mistake: *McMaster v. Insurance Co.*, 55 N. Y. 222; 14 Am. Rep. 239; *Fowle v. Springfield Ins. Co.*, 122 Mass. 191; 23 Am. Rep. 308.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

IN RE TERRILL.

[52 KANSAS, 29.]

COURTS—TERMS OF—POWER OF CLERK TO ADJOURN.—The failure of a judge to attend and open his court upon the day appointed by law for the beginning of the term operates to lapse and end that term, and no further session of the court can be held until the next regular term, or until a special term is legally called. In such case the clerk of the court cannot, in the absence of statutory power, adjourn the court from day to day, or until a future day, and the arrival of the judge for the commencement of the term.

VOID JUDGMENTS—JURISDICTION—LAPSED TERM OF COURT.—A person tried and convicted of crime at a lapsed term of court, and at a time when the court cannot legally be held, is tried when the court is without jurisdiction, and the judgment of conviction is void.

C. R. Buckner, for the petitioner.

S. P. King and H. Huston, for the respondent.

30 JOHNSTON, J. An indictment was returned by the grand jury of Payne county, Oklahoma territory, charging Ira N. Terrill with the offense of murder, and at the trial, held September 26, 1892, he was convicted of the offense charged, and the punishment fixed by the jury was imprisonment in the penitentiary, at hard labor, for life. Subsequently, the sentence of the court was pronounced, adjudging that Terrill be confined in the territorial penitentiary at Lansing, Kansas, for the term of his natural life, where he was conveyed, and is now held in custody by the warden of that prison. He seeks release here by a proceeding in *habeas corpus*, and in his application he alleges several grounds why his imprisonment is illegal, only one of which it will be necessary to

notice. He asserts that the trial was had and the judgment rendered at a time not authorized by law; that the court was then without jurisdiction to take any proceedings against him, and hence the sentence and judgment of the court are absolutely void.

In pursuance of law, the terms of the district courts of Oklahoma were fixed by order of the supreme court, and the terms are required to be held in the county of Payne, commencing on the third Tuesday in April, and the first Tuesday of November of each year. The petitioner was tried in 1892, and during the time within which the April term might have been held; but it appears that the judge of that court was not present at the time and place when the April term of court should have begun, nor was he present in person for several days afterward. The court should have been opened on April 19th, but the judge did not appear until the 26th of that month, when he opened and held court until April 30, 1892. Several adjournments were made by the court, one of which was to June 14, 1892, but the judge of the court again failed to appear, when the clerk attempted to adjourn the court until ³¹ August 16, 1892. At the latter date the judge appeared in person, and held court from time to time, with intervening adjournments, until September 26, 1892, when the trial and conviction of the petitioner occurred.

The failure of the judge to appear and open court upon the day appointed resulted in the loss of the term, and proceedings had by a court at a time not authorized by law are absolutely void. There was then no statute of Oklahoma providing for the adjournment of the court by the clerk or other of its officers in case of the nonattendance of the judge. A statute since enacted, and which went into effect in August of the present year, provides that if the judge of a court fails to attend at the time and place appointed for holding his court, the sheriff shall have power to adjourn it from day to day until the judge does attend or a judge *pro tem.* is selected; and if the judge is not present and a judge *pro tem.* is not selected within two days after the first day of the term, the court stands adjourned for the entire term: Oklahoma Stats., par. 4626. There is ample power in a court which has been regularly convened to adjourn to a future time, provided it be not beyond the term; but, in the absence of a statute authorizing it, the clerk or other ministerial officer can-

not act for the judge in either opening or adjourning court. The clerk is a ministerial officer, and, without statutory authority, can exercise no judicial function. The opening, holding, and adjournment of court are the exercise of judicial power to be performed by the court. To perform the functions of a court, the presence of the officers constituting the court is necessary, and they must be present at the time and place appointed by law. A "court" is defined by Bacon to be "an incorporeal political being, which requires for its existence the presence of its judges, or a competent number of them, and a clerk or prothonotary, at or during which, and at a place where it is by law authorized to be held, and the performance of some public act indicative of the design to perform the functions of a court": Bacon's Abridgment, tit. "Court," A; Hawes on Jurisdiction of Courts, sec. 27. "To give existence to a court, then, ³² its officers, and the time and place of holding it, must be such as are prescribed by law": *Hobart v. Hobart*, 45 Iowa, 503. There being no authority in law for the clerk to open and adjourn court, the consequence of the failure of the judge to appear upon the day appointed for holding the court was the loss of the term: *Union Pac. Ry. Co. v. Hand*, 7 Kan. 380; *People v. Bradwell*, 2 Cow. 445; *People v. Sanchez*, 24 Cal. 17; *State v. Roberts*, 8 Nev. 239; Brown on Jurisprudence, sec. 22; 12 Am. & Eng. Ency. of Law, 296. In the case of *Wight v. Wallbaum*, 39 Ill. 554, the court was regularly in session on the 23d of August, and regularly adjourned until the following day. After that time several adjournments were entered when no judge was present. In reviewing the question, the court said: "After the 23d, for want of a judge, no legal business could have been transacted, and, for that reason, the court stood adjourned. The judge who opened court might, no doubt, have adjourned to a specified day, had the business of the court required it, and business might have been regularly resumed at that time. The judge had no power to authorize the ministerial officers of the court to exercise judicial powers, even in opening and adjourning the court. They not having such authority, and the court not having been opened on the 24th by a judge authorized to exercise the jurisdiction of the court, it stood adjourned after the 23d, and that must be regarded as the last day of the term": See, also, *In re Millington*, 24 Kan. 214; *Lewis v. Hoboken*, 42 N. J. L. 379; *Hoye v.*

State, 39 Ga. 718; *Wightman v. Karsner*, 20 Ala. 446; *Brumley v. State*, 20 Ark. 77; *Thomas v. Fogarty*, 19 Cal. 644.

The failure of the judge of the district court for Payne county, Oklahoma, to attend and open court upon the appointed day operated to end the term; and no further session of the court could be held until the next regular term, or until a special term was legally called. To meet such exigencies, most of the states have enacted statutes for preserving the term similar to those now in force in Oklahoma territory and in Kansas. In the absence of such a statute, the clerk was powerless to keep the court open until the arrival of the judge, many days after the time for the commencement³³ of the term. The petitioner was tried after the April term had lapsed, and the proceedings in connection with his trial and conviction must be regarded as *coram non judice*, and void. Although the right of the court to inquire into the illegal restraint of the petitioner is questioned, no substantial objection to its jurisdiction is or can be urged. He is imprisoned in Kansas and within the jurisdiction of the court, and there is undoubted power in the court to inquire into the cause of his restraint. Having been tried and convicted at a time when the court could not be legally held, the court was without jurisdiction, and the conviction was void.

While the petitioner must be released from imprisonment at the penitentiary, and from the custody of the warden, our judgment will not operate as an unqualified discharge. So far as appears here, he was regularly indicted; and, as the proceedings had against him were without jurisdiction and void, it is possible there was no jeopardy, and that another trial may be had. The warden will, therefore, be directed to release the petitioner from imprisonment in the penitentiary, and deliver him to the custody of the sheriff of Payne county, Oklahoma territory, and for such further proceedings as the prosecuting officers may desire to take.

All the justices concurred.

COURTS.—Proceedings and judgments of a special term of court, when the holding of such term is not authorized, are *coram non judice*: *Dunn v. State*, 2 Ark. 229; 35 Am. Dec. 54. The failure of a court of inferior jurisdiction to meet at the time and place fixed by law will, in the absence of a controlling statute, result in a lapse of that term: *Loesnitz v. Seelinger*, 127 Ind. 422. See, also, *Estate of Hunter*, 84 Iowa, 388.

JURISDICTION—EFFECT OF PROCEEDINGS WITHOUT.—Judgments of a court acting without authority are nullities: *Cockey v. Cole*, 28 Md. 276; 92 Am.

Dec. 683, and note; *Carron v. Martin*, 26 N. J. L. 594; 69 Am. Dec. 584, and note; *Gray v. Fox*, 1 N. J. Eq. 259; 22 Am. Dec. 508; *Müller v. Brinkerhoff*, 4 Denio, 118; 47 Am. Dec. 242; *Two Rivers Mfg. Co. v. Beyer*, 74 Wis. 210; 17 Am. St. Rep. 131. See, also, the extended note to *Morrill v. Morrill*, 23 Am. St. Rep. 109.

IN RE BLACK.

[52 KANSAS, 64.]

JUDGMENTS—AMENDMENT OF.—A court of record may, in criminal cases, at the same term of court in which the conviction is had, and before execution of any part of the sentence, change or amend the latter in form or substance.

COURTS—POWER TO CORRECT RECORDS.—Courts of record have the power in criminal, as well as civil, cases, to correct clerical errors existing in the record of a previous term, if the clerk has failed or omitted to correctly record a judgment in fact rendered, and enough appears in other parts of the record or official memoranda entered at the time of the proceeding of the court to clearly show that such mistake has been made.

JUDGMENTS—AMENDMENT OF.—A court cannot correct a judgment as in fact rendered after the term has passed. The power to amend or change the judgment is then confined to the court having appellate jurisdiction.

BURGLARY—JUDGMENT, WHEN ERRONEOUS, BUT NOT VOID.—An indictment charging burglary in the first degree also includes burglary in the second degree, and although it is erroneous for the court to receive a verdict finding the accused guilty, as charged, without specifying the degree, and then sentence him to imprisonment only authorized in case of conviction for the highest degree, yet the judgment is not void.

VERDICT FINDING DEFENDANT GUILTY AS CHARGED is, in effect, a finding that he is guilty of every matter alleged against him in the indictment.

HABEAS CORPUS—REVIEW OF ERRORS ON.—Mere error or irregularities in court proceedings are not reviewable on *habeas corpus* for the discharge of a prisoner committed under process issued on final judgment of a court of competent jurisdiction.

J. J. Hitt, for the petitioner.

John T. Little, attorney general, for the respondent.

⁶⁵ ALLEN, J. The petitioner, Joseph Black, was charged by the county attorney of Shawnee county with the crime of burglary in the first degree. He was tried in the district court, and on the 23d of April, 1890, the following verdict was rendered: "We, the jury impaneled and sworn in the above-entitled case, do, upon our oaths, find the defendant, Joseph Black, guilty as charged in the information." On the 26th of April, 1890, he was sentenced to confinement at hard labor in the penitentiary for the term of twelve years from

that day. The journal entry contains the following recital: "Thereupon, the said defendant, Joseph Black, was duly arraigned for sentence, he having heretofore been convicted of the crime of burglary in the third degree, as shown by the verdict returned herein." The petitioner was thereupon committed to the penitentiary, where he has remained in confinement ever since. He now asks to be discharged therefrom, and his counsel contends in his behalf that the judgment and the commitment issued thereon are void, because the judgment recites that the defendant was convicted of the crime of burglary in the third degree, the maximum punishment for which, under the law, is five years in the penitentiary.

Since the petition for a writ of *habeas corpus* was presented to this court, the district court in which conviction was had has made an order amending the original journal entry, by striking out the word "third," and inserting the word "first," thereby making the record read: "Thereupon, the said defendant, Joseph Black, was duly arraigned for sentence, he having been convicted of the crime of burglary in the first degree, as shown by the verdict returned herein." It is conceded that a sentence to punishment in excess of that authorized by law would be void. Counsel for the petitioner contends that the record is conclusive; that the journal entry, ⁶⁶ with its recitals, must be taken as we find it; that after the term of court at which the judgment was rendered no change or alteration can be made in the record; that the petitioner, being confined in the penitentiary, cannot have his rights affected by any order the district court may make; and that the legality of his imprisonment must stand or fall by the final record as made up at the term of court at which he was tried. On the other hand, it is claimed that courts may always correct their records so as to conform them to the actual facts, and make them speak the truth; that this may be done in a criminal, as well as in a civil, case.

We think the general doctrine to be gleaned from the authorities is, that at the same term of court at which the defendant was convicted, and before execution of any part of the sentence, the court may change or amend the sentence either in form or substance; but that after the expiration of the term of court, the judgment in fact pronounced by the court cannot be altered. If the clerk has failed or omitted to correctly record the judgment in fact rendered, there is

some question whether the court may, merely from its own recollection of what transpired, or on oral proof, change the record after the adjournment of the term; but where enough appears in other parts of the record, or official memoranda, entered at the time of the proceeding of the court, to show that a mistake has been made by the clerk, then the authorities are almost, if not quite, unanimous in holding that the correction may be made. The following authorities hold that the court has the power to correct errors in the record in criminal cases by *nunc pro tunc* entries made at a subsequent term: *Burnett v. State*, 14 Tex. 455; 65 Am. Dec. 131; *Commonwealth v. Weymouth*, 2 Allen, 144; 79 Am. Dec. 776. In the case of *Ex parte Jones*, 61 Ala. 399, it was held: "that the inherent common-law power of the courts to correct clerical misprisions, where its records furnish proper basis therefor, extends to criminal, as well as civil, cases." In the case of *In re Wight*, 134 U. S. 136, the court sustained an order of the circuit court directing the entry of a *nunc pro tunc* order as of a former term, ⁶⁷ where there were no written memoranda in the case on which to base such order, and it was held that "when it is found by a circuit court of the United States that the clerk has failed to put in the record an order which was made at the next preceding term of the court, remanding a case to the district court, the circuit court may direct such an order to be entered *nunc pro tunc*."

The chief justice and Justice Harlan dissented, however, holding that the court had no power to make such order, in the absence of any entry, minute, or memorandum to proceed by: See, also, 1 Freeman on Judgments, sec. 71.

We think, however, it is well settled that the court cannot correct the judgment which was in fact rendered after the term has passed, the power to change or amend the judgment then being confined to the court having appellate jurisdiction: Freeman on Judgments, sec. 70; Church's Habeas Corpus, sec. 377; *Ex parte Lange*, 18 Wall. 163; *People v. Liscomb*, 60 N. Y. 559; 19 Am. Rep. 211; *Thompson v. Thompson*, 73 Wis. 84; *Stannard v. Hubbell*, 123 N. Y. 520.

It is contended that, even conceding the power of the court to correct the record in accordance with the facts, the sentence actually imposed is unwarranted, and for that reason that the *nunc pro tunc* order of the district court cannot be upheld; that the defendant was charged with the crime of burglary in the first degree; that this charge includes bur-

glary in the second degree: *State v. Behee*, 17 Kan. 402; that the verdict of the jury fails to specify the degree of the offense of which they convicted the defendant, and therefore that, within the authority of *State v. Reddick*, 7 Kan. 143, and *State v. Huber*, 8 Kan. 447, no judgment could be founded on the verdict. In the case of *State v. Jennings*, 24 Kan. 642, this question was again before the court, and the cases of *State v. Reddick*, 7 Kan. 143, and *State v. Huber*, 8 Kan. 447, were discussed by the court, and a majority of the judges expressed the opinion that where a defendant is charged with murder in the ⁶⁸ first degree, and a verdict rendered, finding him guilty as charged in the information, such verdict is not absolutely void, and a judgment entered thereon, though it might be erroneous under the authority of the former cases, if duly challenged, would not be a nullity.

Where a defendant is in close confinement, and afforded no opportunity to appear in court and protect his rights, the power to correct records of conviction made at former terms of court should certainly be exercised only with the greatest caution. The writer entertains serious doubts whether, in any case, the judgment itself should be changed after the term of confinement has commenced; but in this case it is not attempted to change the punishment inflicted in any particular. The only correction is of a recital, which, it appears from the whole record, is clearly a clerical error. The defendant, being charged with burglary in the first degree, could not have been convicted of burglary in the third degree, because the facts necessary to constitute that offense are not included in the charge contained in the information. The verdict finds the defendant guilty as charged. The majority of the court, in *State v. Jennings*, 24 Kan. 642, seem inclined to hold that this is, in effect, a finding that he is guilty of every matter alleged against him in the information, and therefore of burglary in the first degree; but this we do not need to decide.

We think the facts that the defendant was charged with burglary in the first degree, found guilty as charged, and then sentenced by the court to a term of imprisonment only authorized in case of a conviction for the highest degree of the offense warranted the court in correcting the recital, as was done in this case.

We, then, have only to consider the further question, whether the judgment is void because the verdict does not

sustain it. That it may be erroneous will not avail the petitioner in this case. Section 671 of the Code of Civil Procedure provides:

"No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired in either of the cases following; 2. Upon any process issued on any final judgment of court of competent jurisdiction."

Mere errors and irregularities are not reviewable on a writ of *habeas corpus*: Church's Habeas Corpus, sec. 348; *Franklin v. Westfall*, 27 Kan. 614; *Ex parte Nye*, 8 Kan. 99. We think the record in this case shows that the district court regarded the verdict as a verdict of guilty of burglary in the first degree, and proceeded to sentence the defendant accordingly. In doing so the court acted judicially, and judicially determined the effect of the verdict. If the court erred, the defendant had his remedy by appeal. He neglected to avail himself of that right. We do not think he can now obtain his discharge from custody because of an erroneous decision of the court as to the force and effect of the verdict. The writ will be refused.

All the justices concurring.

CRIMINAL TRIALS—AMENDMENT OF SENTENCE.—A judge of the superior court has the power to revise and increase the sentence imposed upon a convict during the same term of court, and before the original sentence has gone into operation: *Commonwealth v. Weymouth*, 2 Allen, 144; 79 Am. Dec. 776, and extended note; but the sentence cannot be revised after the prisoner has been duly committed pursuant to it: *Brown v. Rice*, 57 Me. 55; 2 Am. Rep. 11.

COURTS—POWER TO CORRECT RECORDS.—A court has implied authority to amend its records so as to make them conform to the facts and truth of the case, and may do so upon any competent legal evidence: *Frink v. Frink*, 43 N. H. 508; 82 Am. Dec. 172, and note; 80 Am. Dec. 189, and note; *Crew v. McCafferty*, 124 Pa. St. 200; 10 Am. St. Rep. 578; *Crim v. Kessing*, 89 Cal. 478; 23 Am. St. Rep. 491; *Gibson v. Chouteau*, 45 Mo. 171; 100 Am. Dec. 366, and note. Every court has power not only to direct its clerk to correct clerical errors, but to order its files and records to be restored to their original condition where they have been improperly altered or defaced: *Hollister v. Judges*, 8 Ohio St. 201; 70 Am. Dec. 100, and note. A court cannot alter records of its proceedings, but may correct errors, so that such material issues may be formed as will settle the pending controversy: *Heaston v. Cincinnati etc. R. R. Co.*, 16 Ind. 275; 79 Am. Dec. 430, and note; but this will not be done where there has been long delay on the part of those seeking relief: *Harrison v. Hargrove*, 109 N. C. 346.

JUDGMENTS—AMENDMENT AFTER TERM.—A court cannot alter or vary its final judgment after the term at which it was rendered, except to correct

clerical errors or omissions: *Carlisle v. Killebrew*, 91 Ala. 351; 24 Am. St. Rep. 915, and note with the cases collected. A court may amend clerical errors after the expiration of the term: *Whitwell v. Emory*, 3 Mich. 84; 59 Am. Dec. 220, and note; *De Hymel v. Scottish etc. Co.*, 80 Tex. 493. See, also, the extended note to *Bramlet v. Pickett*, 12 Am. Dec. 351.

CRIMINAL LAW—VERDICT—DEGREE OF OFFENSE.—Upon a trial for murder, where the indictment charges no degree, and where there are two degrees of murder, a verdict of "guilty," specifying no degree, is bad, and a judgment cannot be rendered on it: *Hogan v. State*, 30 Wis. 428; 11 Am. Rep. 575; *State v. Rover*, 10 Nev. 388; 21 Am. Rep. 745. But compare *Welch v. State*, 50 Ga. 128; 15 Am. Rep. 690.

HABEAS CORPUS—REVIEW OF ERROR ON.—*Habeas corpus* does not lie to correct any irregularity of procedure where there is jurisdiction: *Ex parte Prince*, 27 Fla. 196; 26 Am. St. Rep. 67, and note; *Turner v. Conkey*, 132 Ind. 248; 32 Am. St. Rep. 251. See, also, the extended note to *Commonwealth v. Lecky*, 26 Am. Dec. 40.

DREESE v. MYERS.

[52 KANSAS, 126.]

NEW TRIAL.—Upon a hearing of a motion after judgment a motion for a new trial is not essential to a review on appeal.

NEW TRIAL.—A motion for a new trial is not essential to a review on appeal of proceedings upon a motion to set aside a sale of land.

HOMESTEADS—EXEMPTIONS—PURCHASE MONEY.—A debt created by a homestead owner by borrowing money from a third person, without any specific agreement or understanding that such borrowed money is to be used in the purchase of the homestead or the erection of improvements thereon, is not a lien against the homestead, and it is exempt from the payment thereof.

A. D. Gilkeson, for the plaintiff in error.

W. L. Aaron, for the defendant in error.

129 **JOHNSTON, J.** This proceeding was brought to review the ruling of the district court refusing to set aside a sale of real estate which had been made in pursuance of an order of that court. The order was made in an action brought to recover upon an indebtedness of two hundred dollars due from Anna Dreese to Willis A. Myers, and to foreclose a mortgage given to secure the payment of the indebtedness. Personal service was made upon the defendant, Mrs. Dreese, but she filed no answer and made no defense. On May 12, 1888, judgment was rendered for the amount, and for a foreclosure of the mortgage; but no execution of the judgment was attempted until March, 1890, when the order of sale mentioned was issued. After appraisalment and due notice, a sale

of the property—which was a lot in Hays City—was made on April 26, 1889, for more than two-thirds of the appraised value. On the same day, Mrs. Dreese filed her motion to set aside the sale, the principal ground of which was, that the property was a homestead at the time the mortgage was given and foreclosed, occupied by herself and her family, consisting of five children; that she was a married woman, and her husband was still living; and that, as the mortgage was not signed by him, and he was not made a party to the action, nor given notice of its pendency, the mortgage was absolutely void, and a sale of the property under it was unwarranted and illegal.

The testimony offered on the hearing showed that the house and lot on which the mortgage was given had been occupied as a homestead by herself and family since before the execution of the mortgage, and that her husband, who was living, had not signed the mortgage, or otherwise given his consent to its execution. It appears to have been conceded on the ¹³⁰ hearing that there was not that joint consent in the execution of the mortgage necessary to make it valid, but it seems to have been contended that the debt which the mortgage was given to secure arose upon obligations for the purchase price of the lot sold, and for the erection of improvements thereon. The court found "that the money loaned by the plaintiff to defendant was used by defendant to pay the purchase price of said real estate, and to pay for materials for the improvements upon the same, and that the said money was used to discharge said indebtedness and the liens existing thereon." For this reason Mrs. Dreese's motion was denied, and the sale theretofore made confirmed. The testimony, however, fails to sustain the finding of the court.

The claim of Myers that no review can be had because no motion for a new trial was made is not good, for the reason that, upon a hearing of a motion after judgment, a motion for a new trial is not essential to a review. It appears that some of the money borrowed from Myers was used by Mrs. Dreese to pay a balance due upon the lot, and another part was used to pay for lumber previously purchased from another, which had been used in making improvements upon the lot. Neither of these debts, however, was due to Myers, and neither of them constituted a lien against the house and lot. Some time prior to the execution of the mortgage she purchased and obtained the title to the lot from Martin Allen. There

was a balance due Allen upon the lot of thirty dollars, and this amount, together with a little interest thereon, was paid by her out of the two hundred dollars borrowed from Myers. She had previously purchased a bill of lumber from one Haverman, on which there was a balance due of about forty dollars, and out of the money borrowed she paid him the sum of thirty-two dollars and twenty-five cents. No other claims due for the purchase price of the lot, or for the erection of improvements thereon, are shown to have been paid out of the money borrowed from Myers. If both of these sums had been properly chargeable against the property, or, rather, if it had not been exempt from the payment of both of these, they would still be insufficient in amount to equal the debt ¹³¹ for which the property was ordered to be sold. As to the claim for lumber, it appears that Haverman had not attempted to secure a lien upon the property, nor had he attempted to transfer his claim to Myers. Mrs. Dreese did not owe Myers for the lumber, and the fact that a portion of the money borrowed from him was used to pay the open lumber account of Haverman did not make the borrowed money an obligation or liability incurred for the improvement of the homestead. As between Haverman and Mrs. Dreese, it might have been treated as a liability contracted for the improvement of the homestead, and a judgment upon his claim for lumber and material furnished in favor of Haverman would have constituted a lien upon the homestead: *Tyler v. Johnson*, 47 Kan. 410. But as between Myers and Mrs. Dreese it can only be regarded as money borrowed to pay a pre-existing indebtedness. It does not appear that the money was borrowed from Myers with the agreement that any portion of it was to be used to pay Haverman. The lumber was rather purchased on the personal credit of Mrs. Dreese, and the borrowed money appears to have been loaned by Myers upon the supposed security of the invalid mortgage. The distinction between a liability for purchase money, or improvements, and money borrowed upon other security, which is subsequently used to pay the purchase money, or for improvements, is pointed out in *Eyster v. Hatheway*, 50 Ill. 522; 99 Am. Dec. 537; 19 Am. & Eng. Ency. of Law, 573; Waples on Homesteads and Exemptions, 341. In respect to the indebtedness to Allen for the balance of the purchase price of the lot, some testimony was offered that the money was loaned by Myers with the understanding and agreement between all parties

that a portion of it should be used to pay the balance due upon the lot. If the purchase of the lot and the loaning of the money, with the agreement that it should be used to pay for the lot, can all be taken together and regarded as a single transaction, so as to bring it within *Nichols v. Overacker*, 16 Kan. 54, then the property in question would not be exempt from liability for the payment of that much of the judgment; or, if the testimony shows that there was such an agreement and understanding ¹³² between all the parties concerned as would subrogate Myers to the rights of Allen, the exemption might then be held inapplicable to that portion of the debt. The testimony upon this branch of the case is not very clear or satisfactory; but in any event the order of the court must be reversed, as the property was ordered to be sold for debts not enforceable against it.

The judgment of the district court will be reversed, and the cause remanded for further proceedings.

All the justices concurred.

APPEAL—NECESSITY FOR MOVING FOR NEW TRIAL.—An appeal may be taken to a higher court without moving for a new trial in the court below: *Innis v. Steamer Senator*, 1 Cal. 459; 54 Am. Dec. 305. A motion for a new trial is not necessary when a case is tried by a court without a jury: *North Hudson etc. Loan Assn. v. Childs*, 82 Wis. 460; 33 Am. St. Rep. 57. The contrary doctrine is maintained in *Harlan v. Bernie*, 22 Ark. 217; 76 Am. Dec. 428.

HOMESTEAD—LIEN FOR PURCHASE MONEY.—Money borrowed to purchase land is not purchase money within the meaning of the Illinois statute declaring that the homestead right should not be claimed against a debt due for the purchase money: *Eyster v. Hatheway*, 50 Ill. 521; 99 Am. Dec. 537, and note. Money paid for land by a third person directly to the grantor for the grantee is purchase money as against the homestead right of the grantee: *Austin v. Underwood*, 37 Ill. 438; 87 Am. Dec. 254. A debt for the purchase money of a homestead is not a debt contracted after the purchase of the homestead, so as to render the property exempt as to such debt: *Christy v. Dyer*, 14 Iowa, 438; 81 Am. Dec. 493. This question is further discussed in the extended note to *Magee v. Magee*, 99 Am. Dec. 574.

FRIEND v. MILLER.

[52 KANSAS, 189.]

EVIDENCE—COURT RECORDS OF ANOTHER STATE.—A record of proceedings of a court of another state or territory, duly authenticated as required by law, is admissible in evidence to show that such proceedings were had.

COMPOUNDING FELONY—VOID NOTE.—An agreement to stifle a criminal prosecution, or to withhold proof therein, so as to obstruct the course of public justice, or to conceal a felony, is absolutely void, and no recovery can be had upon a note given in consideration thereof.

EVIDENCE—PAROL TO VARY WRITING.—The rule forbidding the introduction of parol evidence to contradict, add to, or vary a written instrument does not extend to evidence offered to show that a contract was made in furtherance of objects forbidden by statute, by common law, or by the general policy of the law.

ACTION to recover upon a note for seventeen hundred dollars, executed by H. F. and J. A. Friend, in favor of C. R. Miller, payment being guaranteed by W. R. Tucker and W. Mathewson. Judgment for plaintiff. Defendants appealed.

Amidon and Conley, and N. Allen, for the plaintiffs in error.

Stanley and Hume, for the defendant in error.

¹⁴⁴ JOHNSTON, J. The demurrer to the evidence admitted every fact and conclusion which the testimony most favorable to the defendants below tended to prove. The court could not weigh conflicting testimony, nor withdraw the case from the jury, because the testimony tending to establish the defense was weak and unsatisfactory. It could not direct a verdict in favor of Miller, unless the opposing parties entirely failed to offer proof tending to establish something essential to the maintenance of their defense: *Kansas Pac. Ry. Co. v. Couse*, 17 Kan. 571; *Brown v. Atchison etc. R. R. Co.*, 31 Kan. 1; *Christie v. Barnes*, 33 Kan. 317; *Sullivan v. Phenix Ins. Co.*, 34 Kan. 177. An examination of the testimony and of the rulings of the court, together ¹⁴⁵ with its explanatory remarks, convinces us that there should be another trial of the cause. There was testimony tending to show that when the note was given a criminal prosecution was pending in the courts of the territory of Utah against Friend and Osborn upon a charge of forgery. This was shown by a record of the proceedings in the Utah court, authenticated as the law requires. The contention that the proceedings were not

sufficiently authenticated to entitle them to be used as evidence in the courts of this state is not good. The court can take notice of the constitutions of other states constituting courts, and it can also take notice of the acts of Congress providing for the organization of territories and the creation of courts therein, so far as the jurisdiction of such courts is shown: *Dodge v. Coffin*, 15 Kan. 277; *Haynes v. Cowen*, 15 Kan. 337. Within the rule of these authorities the authentication in question was amply sufficient, and justified the admission of the record. More than that, it was admitted and considered by the court, and may justly be considered by this court, in determining whether there was sufficient testimony offered to take the case to the jury. There was testimony tending to show that the prosecution was begun at the instance of Miller, who had employed counsel to assist in the prosecution, and had spent money to procure evidence to sustain the charge. There was other testimony tending to show that he had the control and possession of written testimony important and material to a successful prosecution. A number of civil actions between these parties had been commenced, and, to settle all differences between them, an agreement was made for the compromise and dismissal of the civil actions; and this agreement appears, from some testimony, to have involved, also, the discontinuance of the prosecution in Utah, and the surrender by Miller of the testimony of which he had control that might be used in that prosecution. In consideration of these agreements the note in question was given.

There can be no question that an agreement for the purpose of stifling criminal prosecutions, or for the withholding of ¹⁴⁶ proof so as to obstruct the course of public justice, is absolutely void. The defendants in the prosecution were charged with a forgery, and the compounding of such an offense is itself a felony. An agreement or understanding, express or implied, to conceal a felony, or to abstain from a prosecution thereof, or to withhold any evidence thereof, is punishable by confinement at hard labor for a term not exceeding five years: Crimes Act, sec. 161. If the consideration for the note was that Miller should withhold or suppress material evidence and prevent further prosecution of the charge, or if these things were a part of the consideration for the note, it would vitiate the whole, and no recovery could be had upon it: *Gerlach v. Skinner*, 34 Kan. 86; 55

Am. Rep. 240; *Hinnen v. Newman*, 35 Kan. 709; *Haynes v. Rudd*, 102 N. Y. 372; 55 Am. Rep. 815. There is testimony that part of the consideration for the note was that Miller should surrender the instrument alleged to have been forged, together with certain depositions pertaining to the same matter, and that Miller said that, if the note or the money were not given to him, the criminal prosecution in Utah could not be dismissed, and the deed and evidence could not be surrendered. It was also testified that a part of the agreement was reduced to writing, and a part was not, Miller saying that if the agreement with reference to the Utah matter was reduced to writing it would criminate him. The written agreement which is in evidence, after providing for the settlement of other controversies, provided that Miller should—

“Not employ or assist in the employment of counsel or other persons to conduct or assist in conducting a certain action now pending in the territory of Utah, wherein the people of the territory of Utah are plaintiff, and H. F. Friend and N. E. Osborn are defendants, or to furnish or provide any money or obligation for the payment of money to assist in the prosecution of such action, or furnish money to procure the presence of any parties at said trial.”

It is contended that the written agreement must be presumed to have embraced the whole understanding of the ¹⁴⁷ parties, and that testimony showing a different understanding or agreement than that reduced to writing should have been excluded, and, although not excluded, was entitled to no consideration by the court. It is probable, as contended, that the provisions of the written agreement not to employ counsel or other persons to assist in conducting the prosecution in Utah, and not to provide money or obligation for money to carry on the prosecution, or to procure the presence of witnesses at the trial, may not be in violation of law or morals; but this writing will not prevent the parties from showing the exact consideration for the note, although it might, to some extent, be at variance with the writing. Parol testimony is admissible, not to contradict the instrument, but to show that it is illegal and altogether void. “The rule which forbids the introduction of parol evidence to contradict, add to, or vary a written instrument does not extend to evidence offered to show that a contract was made

in furtherance of objects forbidden by statute, by common law, or by the general policy of the law": *Martin v. Clarke*, 8 R. I. 389; 5 Am. Rep. 586; *Peed v. McKee*, 42 Iowa, 689; 20 Am. Rep. 631; Greenleaf on Evidence, sec. 284; Browne on Parol Evidence, secs. 33, 34; Jones on Construction of Contracts, sec. 191. Under the rule of these authorities some of the testimony which was excluded should have been admitted; but there was enough of that which was admitted to carry the case to the jury. It is true that the evidence respecting the agreements of the parties as to the Utah prosecution is weak and somewhat contradictory, and, possibly, if submitted, the jury might have brought in such a verdict as the court directed. The plaintiffs in error, however, were entitled to have the testimony, with all its contradictions and inconsistencies, submitted to the jury, and the value and sufficiency of the same were questions for their determination. The averments of the answer were somewhat general with respect to the illegal agreement, but they were not attacked upon this ground except by objections to testimony when the court refused to permit an amendment. Under the circumstances, we think that ¹⁴⁸ the proof offered was entitled to consideration. As there must be a new trial of the cause, the averments of the answer may be made as specific as is necessary.

The error of withdrawing the case from the jury and directing a verdict compels a reversal of the judgment and the remanding of the cause for another trial.

All the justices concurred.

NEGOTIABLE INSTRUMENTS GIVEN TO COMPOUND FELONIES: See the extended notes to *Workman v. Wright*, 31 Am. Rep. 549; *Hill v. Freeman*, 49 Am. Rep. 49; *Town of Hinesburgh v. Sumner*, 31 Am. Dec. 600; and the note to *Cass County Bank v. Bricker*, 33 Am. St. Rep. 653.

MISSOURI PACIFIC RAILWAY COMPANY v. RENFRO.

[52 KANSAS, 237.]

RAILROADS—LIABILITY FOR SURFACE WATER.—A railroad company is not compelled to construct a culvert upon its own land to carry off surface water.

RAILROADS—LIABILITY FOR SURFACE WATER.—The fact that a railroad company raises an embankment upon its own land which prevents the surface water falling and running upon the land of an adjoining owner from running off such land, and causes it to accumulate thereon, to its damage, gives to the latter no cause of action against the former, nor is the rule changed by the fact that a culvert could have been made under such embankment sufficient to have afforded an outlet for all surface water, nor by the fact that a culvert placed therein was insufficient to afford such outlet.

SURFACE WATER.—One landowner has the right to use and improve his own land for the purposes for which similar land is ordinarily used. He may raise or lower its surface, even though the effect may be to prevent surface water, which before flowed upon it, from going upon it, or to draw from adjoining land surface water which would otherwise remain there, or to shed surface water over land on which it would not otherwise go.

RAILROADS—EMBANKMENTS—LIABILITY FOR SURFACE WATER.—A railroad company which, for the purpose of properly constructing its roadbed on its own right of way, takes earth from one part of its premises and uses it upon such roadbed, thus leaving an excavation or ditch along each side of it, this being the ordinary way of constructing railroads in prairie countries, is not liable to an adjoining landowner for injuries caused by an accumulation, or the prevention of an accumulation, of surface water occasioned by such embankment.

J. H. Richards and C. E. Benton, for the plaintiff in error.

S. S. Kirkpatrick, for the defendant in error.

240 **HORTON, C. J.** This was an action in the court below by Samuel H. Renfro against the Missouri Pacific Railway Company to recover damages to his premises resulting from surface water. Before the damages occurred a right of way was properly condemned for the railway company through his premises, and the damages assessed for the construction of the road were received by him. In his petition Renfro alleged that the railway was negligently and unskillfully constructed, with deep ditches upon the sides thereof, for a mile or more, and that a narrow and insufficient culvert was constructed under the road on his land, so that the surface water collected and conducted down on his land was unable to pass through the same. Upon the trial the jury found that the road was improperly and negligently constructed, as follows:

"By digging long and continuous ditches along said railroad and tearing down embankment at hedge north of plaintiff's premises, thereby conducting a large volume of water onto said premises that would not otherwise run there, thereby cutting a ditch through plaintiff's land and otherwise damaging it. Also, by constructing a culvert so small through railroad grade that the water could not run off without flooding plaintiff's land west of railroad."

The examination of the evidence, however, shows that there was no evidence introduced to sustain the finding that the railroad was not properly constructed. The railway company had a right to construct and maintain its road, and all of its acts were done upon its right of way, for which Renfro received compensation. The "long and continuous ditches" referred to in the findings were caused by taking dirt from either side of the line of the road for the purpose of constructing a roadbed. The plaintiff testified:

"Q. This road is now level—about with the ground?

"A. Graded up.

"Q. This road is built through here, and there are borrow-pits on both sides of it where they took out the dirt to make the grade?

"A. Yes, sir.

241 "Q. Those ditches are where they took out the dirt to make the grade?

"A. Yes, sir."

The "tearing down of the embankment at the hedge north of Renfro's premises" was not complained of in the petition, and, even if it were, it appears from the evidence that the railway could not have been constructed without cutting through the hedge, and, therefore, that was not an improper or negligent act. The plaintiff testified:

"Q. Now, the hedgerow crosses the railroad here?

"A. Yes, sir.

"Q. And in making that right of way they cut a place through the hedgerow?

"A. Yes, sir.

"Q. And the water turned into that ditch?

"A. Yes, sir.

"Q. They could n't very well build a road without doing that, could they?

"A. No, sir.

"Q. They could n't at all?

"A. No, sir; but I don't consider that I am responsible for that."

In reference to the culvert being too small, it is sufficient to say that the company was not compelled to construct a culvert upon its own land to carry off surface water. In *Atchison etc. R. R. Co. v. Hammer*, 22 Kan. 763, 31 Am. Rep. 216, it was decided that—

"The simple fact that the owner of one tract of land raises an embankment upon it which prevents the surface water falling and running upon the land of an adjoining owner from running off said land, and causes it to accumulate thereon, to its damage, gives to the latter no cause of action against the former; nor is the rule changed by the fact that the former is a railroad corporation, and its embankment raised for the purpose of a railroad track, nor by the fact that a culvert could have been made under said embankment sufficient to have afforded an outlet for all such surface water."

In that case Brewer, J., speaking for the court, remarked:

"No exception is shown to the general rule by the fact that the party raising the embankment is a railroad corporation, and the embankment raised upon its right of way for use as a railroad track, nor by the fact that a culvert could have ²⁴² been placed in such embankment sufficient to have afforded an outlet for all such surface water, nor by the fact that a culvert was placed therein insufficient to afford such outlet."

There is a conflict in the decisions of the different states upon the subject of surface water, because some follow the rule of the civil law and others the rule of the common law. The rule of the common law has already been adopted in this state, and under that rule one landowner has the right to use and improve his own land for the purpose for which similar land is ordinarily used; and he may build upon it, or raise or lower its surface, even though the effect may be to prevent surface water, which before flowed upon it, from going upon it, or to draw from adjoining land surface water which would otherwise remain there, or to shed surface water over land on which it would not otherwise go.

In the late case of *Chicago etc. Ry. Co. v. Steck*, 51 Kan. 737, the authorities concerning the nonliability for damages resulting from surface water are collated. In that case it was held that—

"An owner of land who builds an embankment thereon which obstructs the flow of surface water that falls and accumulates upon his neighbor's land does not become liable for the injury arising therefrom, unless the passageway through which it flows is such as to constitute a watercourse."

Jordan v. St. Paul etc. Ry. Co., 42 Minn. 172, is very similar to the one at bar. It was observed by the chief justice:

"The case is, therefore, one where the railroad company, for the purpose of properly constructing its roadbed, takes earth from one part of its premises and uses it upon the roadbed, thus leaving an excavation or ditch along each side of it, which is the usual and ordinary way of constructing railroads in prairie countries. . . . It is conceded that the defendant had a right to construct and maintain its railroad, and that its acts were done upon its right of way, rightfully acquired. It is to be regarded, therefore, as an owner doing the acts complained of on its own premises; and its duty and liability are to be measured by the rule as to the duty and liability in respect ²⁴³ to surface waters that attaches in the case of an owner in the use of his own land": See, also, *Johnson v. Chicago etc. R. R. Co.*, 80 Wis. 641; 27 Am. St. Rep. 76; *Lessard v. Stram*, 62 Wis. 112; 51 Am. Rep. 715; *Abbott v. Kansas etc. R. R. Co.*, 83 Mo. 271; 53 Am. Rep. 581; *Henderson v. City of Minneapolis*, 32 Minn. 319; *Hanlin v. Chicago etc. Ry. Co.*, 61 Wis. 515; Angell on Watercourses, 7th ed., 118-121; *Hannah v. St. Paul etc. Ry. Co.*, 5 Dak. 1. In the latter case it was remarked:

"If, by the usual and ordinary construction of its road, the surface of the earth was necessarily changed, and the currents of the surface water were interrupted and diverted, it was one of those ordinary incidents of railroad construction which might have been reasonably expected to have resulted from such work, and one that plaintiffs themselves were bound to have guarded against, and to have used such precautions as were in their power to remedy. Any other rule would require railroad companies in level countries to build their roads upon elevated trestles, or encounter the hazard of some disturbance of surface elements."

If the petition had not alleged that the railway was constructed in a negligent and unskillful manner it would have been demurrable; but as it appeared from the evidence that the railway was constructed in the usual and ordinary manner, and that the ditches complained of were the mere inci-

dents of, or necessary to, the proper construction of the road, no liability to the landowner for injuries from surface water rested upon the railway company.

On the part of Renfro two cases are cited from Minnesota which are claimed to be nearly identical with the case presented, and to sustain the judgment rendered. These are *Hogenson v. St. Paul etc. Ry. Co.*, 31 Minn. 224, and *Olson v. St. Paul etc. R. R. Co.*, 38 Minn. 419. In the first case the railway company extended its road in a northeasterly and southwesterly direction; there were ditches parallel with the railroad; the water collected in these ditches, and the company, for the express purpose of draining its land, ²⁴⁴ and for no other purpose, dug a ditch westerly from the railroad, and about three miles long, and thereby drained its land, and other low, wet, and marshy land, onto the plaintiff's. In that case the ditch complained of was made for the purpose of drainage only, and not as incidental or necessary to the construction of the road. In the second case the railway company built a ditch at a right angle from the ditches excavated parallel to, and upon each side of, its roadbed. This ditch, also, was for the purpose of drainage only, and not built for the purpose of properly constructing the roadbed. These two, and the other cases cited in support of the judgment, excepting those from Iowa and Illinois, where the rule of the civil law as to the flow of surface water is in force, are all based upon the doctrine that a landowner may not, by way of drainage only, improve his own land by transferring to the land of another a burden which nature imposed upon his own lands; but none of the decisions from the states where the rule of the common law concerning surface water has been adopted prevent a landowner from obstructing or diverting surface water from its usual course, if the same is done in the usual and ordinary manner, and as a mere incident to the improvement of his lands, by the building of a house, a railroad, or any other like structure.

There is a marked distinction between *Atchison etc. R. R. Co. v. Hammer*, 22 Kan. 763; 31 Am. Rep. 216; *Chicago etc. Ry. Co. v. Sterk*, 51 Kan. 737; *Jordan v. St. Paul etc. Ry. Co.*, 42 Minn. 172; *Hannaher v. St. Paul etc. Ry. Co.*, 5 Dak. 1, and the *Hogenson* and *Olson* and similar cases, which is clearly noticeable, if the opinions are carefully read and examined. In fact these cases do not conflict, but the latter cases are not

applicable to the facts of this case; therefore, the principles in the former cases control.

For the list of states that follow the common-law rule concerning surface water, and those that follow the civil-law rule, see 34 Am. & Eng. R. R. Cas. 148-152; Gould on Waters, sec. 265.

245 The judgment of the district court will be reversed, and the cause remanded for further proceedings.

All the justices concurred.

RAILROADS—LIABILITY FOR OBSTRUCTING SURFACE WATER.—A railroad company, in constructing its road over watercourses, must make suitable bridges, culverts, or other provisions for carrying off the water as effectually as the stream would if in its natural state, and has no more right than any private owner to turn a stream of water upon land on which it does not naturally flow: *Ohio etc. Ry. Co. v. Thillman*, 143 Ill. 127; 36 Am. St. Rep. 359, and note with the cases collected, discussing the questions discussed in the principal case.

KANSAS CITY v. BRADY.

[52 KANSAS, 297.]

MUNICIPAL CORPORATIONS—DEFECTIVE DRAINAGE—LIABILITY FOR.—When a city in grading a street builds a high embankment across a natural watercourse, and constructs a culvert through it sufficient for the passage of the stream, and subsequently another person or corporation places a high embankment on its own land adjacent to such street, and constructs a similar drain on the same plan as that adopted by the city, but the latter drain becomes obstructed, and dams up the water so as to flood private property, the fact that the city permits such person or corporation to join its drain to that constructed by the city does not render the latter liable for the injury thus caused.

MUNICIPAL CORPORATIONS—LIABILITY FOR ACTS OF OFFICERS.—A city is liable only for the acts of its officers performed within the lines of their duties, and if a city engineer plans a defective drain constructed by private persons, which subsequently causes injury to private property, the city is not liable therefor.

PRACTICE—FINDINGS INCONSISTENT WITH VERDICT.—When special findings of fact are inconsistent with the general verdict rendered the former controls the latter, and the court may give judgment accordingly.

ACTION by Brady against Kansas City and the Orchard Place Land Company to recover damages to buildings caused by the overflow of Splitlog creek, which crossed Tenney avenue. The grade line of said street ran about thirty-five feet above the channel of said creek. To provide for the passage of water across this street the city constructed a brick culvert through the embankment made in bringing the street

up to the grade. In constructing this embankment the slopes thereof extended some fifty feet onto the lands of the Orchard Place Land Company, lying immediately south of said street, and the city constructed the culvert, not only across the street, but also to the edge of the embankment. Thereafter, the said company graded its land about seven feet higher than the grade line of the street, and extended the culvert across its lands similar in all respects to that constructed by the city. Plaintiff alleged that the construction of this culvert was the joint act of the defendants; that it became obstructed because of its faulty construction and insufficient dimensions, and caused the water to back up and flow into plaintiff's buildings. Verdict and judgment for plaintiff. The defendant city appealed.

James M. Rees and K. P. Snyder, for the plaintiff.

True and True, and Littick and Littick, for the defendant in error.

³⁰⁴ ALLEN, J. The theory of the plaintiff was that the construction of the covered waterway was the joint act of the city and the Orchard Place Land Company; that the whole structure should be treated as one entire thing, and that both defendants are liable for any defects in its construction; that the city engineer, as a representative of the city, planned the work; and that the city is responsible, not only for any defects in the construction of that part which was built and paid for by the city, but of that which the Orchard Place Land Company constructed as well. The jury found that the embankment and culvert constructed by the city would not have caused injury to the plaintiff, and that the obstruction of that part of the drain which was built by the Orchard Place Land Company did cause the overflow of plaintiff's property. The ³⁰⁵ only ground on which the jury based the city's liability, given in answer to the special questions, is in locating the sewer, and permitting the land company to attach its sewer to the city sewer, and for neglecting to require the Orchard Place Land Company to keep its sewer in repair. The building of the sewer was not all done either at one time or as one act. The city finished all it constructed some time before the land company built its part. That part constructed by the land company was wholly on its own lands, where it needed no license nor authority from the city. It was wholly outside of the official duty of the city engineer to make plans

or give directions as to what the land company should do on its own property. The city council had no other or greater jurisdiction over its property than over that of any other proprietor owning land along Splitlog creek. It had no lawful authority to permit any one to obstruct a natural water-course.

It is not contended that the obstructions placed in the bed of the stream by the land company were a nuisance, which it was the duty of the city to remove, and that the city is liable because of the failure of the city officers to remove a nuisance, but plaintiff seeks to connect the city with the original placing of the obstruction in the stream. It is expressly found that the part of the sewer which caved in and caused the obstruction was built solely by the land company. The mere fact that it was built on the same plan as that constructed by the city, and that it joins the city's part either on the line between the street and the land company's property or on the company's land, does not show, nor tend to show, any connection of the city with it. Generally speaking, property owners have a right to build what they please on their own lands, provided they do not thereby occasion injury to others. They have no right to obstruct natural watercourses, nor have the city authorities the right to permit them to do so. If they do place obstructions in a stream, and thereby occasion a nuisance injurious to others, it may be that the city authorities would ³⁰⁶ have the right to cause its removal; but private individuals injured thereby also have an independent remedy, and may proceed in the courts to cause its removal. Suppose, in this case, that there was a succession of private landowners, who saw fit to construct covered ways for the flow of the water of this stream; five of them so constructed their portions that no injury would result to any one, but the sixth builds his drain as that of the land company was built, so that it falls down and causes injury. Would the mere fact that the obstruction prevented the water from flowing through the parts of the drain constructed by the other five render them liable also? Or could it be held that the similarity of construction had any thing to do with the case? And how could one proprietor prohibit his neighbor from joining on and extending the waterway from the boundary line across his own land?

It cannot be successfully contended that the city is responsible for any bad advice or defective plans the city engineer may

have made for private parties. The city can only be bound for acts of its officers done within the lines of official duty. The city engineer's public duties terminated with the end of that part of the culvert which the city in fact constructed. For whatever he may have done beyond that, he may, perhaps, be responsible individually, but the city is not. The jury find that the city completed its embankment about two months before the Orchard Place Land Company built the embankment below it. Counsel for defendants in error cite us to many authorities to the effect that the city has no right to obstruct a natural watercourse, and that where two or more, by their concurrent negligence, cause injury to a third person, they are jointly and severally liable. With the correctness of this proposition we are not disposed to take issue. We have carefully examined the case of *Bryant v. Bigelow Carpet Co.*, 131 Mass. 491, which counsel so confidently rely on as strictly in point, and have no fault to find with it. The plaintiff's injury in that case was occasioned partly by the act of the carpet ³⁰⁷ company in constructing its dam and partly by that of the railroad company in constructing its embankment and permitting the culverts thereunder to become obstructed. Both concurred directly in causing the overflow which destroyed the plaintiff's property, and it did not appear that the injury would have resulted without such concurrence; but in this case the jury find, in effect, that the injury was occasioned solely by the obstructions on the Orchard Place Land Company's property. It does not appear that the flow of water over plaintiff's premises was increased a drop by reason of the embankment built by the city. In that case it appeared that the carpet company raised its dam so as to raise the height of the water six or seven feet above the top of the culverts under the railroad, but the water on the side of the road nearest plaintiff's property was raised by the railroad company's embankment more than two feet higher than on the other side. In other words, the carpet company raised the water part way and the railroad company raised it the rest. The dam of the carpet company would not alone have caused the injury, nor would the embankment of the railroad and its defective culverts alone have done so. The carpet company erected insufficient embankments to sustain the water on the side next plaintiff's property, and was negligent in that respect. The decision is placed explicitly on the ground that the acts of both defendants contributed to

plaintiff's injury. We think that case was correctly decided, yet that it does not assist the plaintiff in this. It is true the jury found that the culvert built by the city was defective, being too small; but this could give the plaintiff no cause of action against the city unless the defect caused injury to her. Her property was located about a thousand feet up stream; and, though the obstruction caused by the grading of Tenney avenue would have caused the water to flow back in time of floods, the jury found that it would not have occasioned injury to the plaintiff. This is not a case where the city dams up one outlet and the Orchard Place Land Company another, so that the two acting together retain the water, but the obstruction ³⁰⁵ which causes the injury is solely the work of the Orchard Place Land Company. Section 287 of the code provides: "When a special finding of facts is inconsistent with the general verdict the former controls the latter, and the court may give judgment accordingly."

We think the findings in this case show that the city is not liable. The judgment will be reversed, and the case remanded, with directions to enter judgment in favor of the defendant, the city of Kansas City, for costs.

All the justices concurred.

MUNICIPAL CORPORATIONS—LIABILITY FOR DEFECTIVE DRAINAGE.—Under the constitution of Texas a city is liable for damage to private property resulting from the overflow of water caused by its raising the grade of the street above the adjoining lots, and its failure to provide a sufficient sewer to carry off the water, notwithstanding it has authority by its charter to grade its streets and lay sewers therein: *Cooper v. City of Dallas*, 83 Tex. 239; 29 Am. St. Rep. 645, and note, with the cases collected. See, also, *Chalkley v. City of Richmond*, 88 Va. 402; 29 Am. St. Rep. 730, and extended note.

MUNICIPAL CORPORATIONS—LIABILITY FOR ACTS OF OFFICERS.—A municipal corporation is not answerable in damages for the negligent acts of its officers in the execution of such powers as are conferred on the city or its officers for the public good: *Ulrich v. St. Louis*, 112 Mo. 138; 34 Am. St. Rep. 372, and note. This question is exhaustively treated in the monographic note to *Goddard v. Inhabitants of Harpswell*, 30 Am. St. Rep. 376.

ROSE v. DOUGLASS TOWNSHIP.

[52 KANSAS, 451.]

OFFICIAL BONDS—PRESUMPTION AS TO EXECUTION—ESTOPPEL.—Sureties who sign an official bond in blank as to the penalty, and then permit it to pass out of their hands in that condition, and it is subsequently filled in with a certain sum as a penalty, and in that condition filed with the county clerk, by the principal, presented for approval and accepted as filled up, are estopped from complaining, as this is *prima facie* evidence that the bond was so filed and accepted by their authority.

OFFICE AND OFFICERS—LIABILITY OF TREASURER AND SURETIES.—A township treasurer, by accepting such office, assumes the duty of receiving and safely keeping the money of the township, and paying it out according to law. He and his sureties are bound to make good any deficiency which may occur in the funds which come under his charge, whether they are lost in bank or otherwise, and any agreement or arrangement to the contrary with other officers of the township does not discharge the treasurer or his sureties.

Redden and Schumacher, for the plaintiffs in error.

Shinn and Knowles, for the defendant in error.

452 HORTON, C. J. D. S. Rose and George W. Hogg, the sureties upon the official bond of C. A. McNabb, treasurer of Douglass township, in their answer admitted that the township was duly organized; that McNabb was duly elected treasurer of the township; that the bond sued on was filed in the office of the county clerk on the seventeenth day of November, 1887; that the board of county commissioners, on the third day of January, 1888, entered their approval upon the bond; that McNabb took the oath of office and entered upon the discharge of the duties thereof, and, as treasurer, collected and received the moneys alleged in the petition, and subsequently failed to pay over to his successor from such moneys two thousand and seventy-two dollars and seventy-three cents. The further allegations in the answer, that the sureties signed a blank bond on November 17, 1887; that no amount was written therein; that they never authorized any one to insert **453** five hundred dollars, or any other amount; that the same was inserted after it had been signed by them, without their knowledge or consent, and that they never authorized any one to fill in the bond, in view of the allegations of the petition, and the admissions in the answer, did not state any sufficient defense. They did not connect the township, or any of the township officers, with receiving a blank bond, or with filling the same up, or with knowledge of

the matters relied upon by the sureties for a defense. "If one signs his name to a bill or note, leaving a blank for the sum, and intrusts it to another, this is a *prima facie* evidence of authority": 1 Parsons on Contracts, 109; *McCormick v. Bay City*, 23 Mich. 457; *Butler v. United States*, 21 Wall. 272; *Taylor County v. King*, 53 Iowa, 153; 5 Am. St. Rep. 666. Again, if the sureties signed the official bond when blank as to the penalty, and then permitted it to pass out of their hands in that condition, and it was subsequently filled in with five hundred dollars, without their authority, and in that condition filed with the county clerk, and presented for approval and accepted so filled up, the sureties are estopped from complaining. The law casts the burden upon him by whose act, omission, or negligence a third party is wronged: *Wichita Savings Bank v. Atchison etc. R. R. Co.*, 20 Kan. 520; *Jordan v. McNeil*, 25 Kan. 465.

The fact that McNabb kept the township money on deposit in the bank, with the knowledge and consent of the township board, and that after the bank suspended the clerk of the township board presented a claim against the bank for the township money, and a dividend was paid the township upon such amount, does not release or discharge sureties for any balance thereafter remaining due. The statute makes no provision for any township depository. McNabb deposited the money in the bank at his peril: Gen. Stats. of 1889, pars. 7079, 7094, 7120. By accepting the office of township treasurer, McNabb assumed the duty of receiving and safely keeping the money of the township and paying it out according to law. He or his sureties are bound to make good any deficiency which might occur in the funds which came under his charge, whether they were lost in the bank or otherwise. ⁴⁵⁴ Any agreement or arrangement to the contrary with other officers of the township would not discharge the treasurer or his sureties: *Manley v. City of Atchison*, 9 Kan. 358; *Myers v. Board of Education*, 51 Kan. 87; 37 Am. St. Rep. 263; *State v. Harper*, 6 Ohio St. 607; 67 Am. Dec. 363; *United States v. Prescott*, 3 How. 588; 7 Lawson's Rights, Remedies, and Practice, 3822.

We do not think that the decisions which we are referred to for the sureties are authority for their discharge. In this case no mortgage or security was taken by the township officers subsequent to the execution of the official bond, as in *Goodin v. State*, 18 Ohio, 6. The other cases have reference

to private parties or private corporations. In the Goodin case, at the expiration of the treasurer's term of office, his individual note was taken on time, secured by mortgage, in settlement, and a receipt in full given to such treasurer. Here a dividend was accepted from the assignee of the insolvent bank where the moneys had been deposited by the treasurer, and also a certificate was received showing the amount such treasurer had on deposit when the bank failed and not thereafter paid over. This and nothing more.

The judgment of the district court will be affirmed.

All the justices concurred.

OFFICIAL BONDS—BINDING EFFECT OF BONDS SIGNED IN BLANK.—A bond required to be filed in a public office, which is signed in blank by a surety, and intrusted to another to be filled out, binds the surety: *Hessell v. Johnson*, 63 Mich. 623; 6 Am. St. Rep. 334, and note; but where a bond is executed in blank before a justice of the peace, who is told what he shall afterwards insert in the blanks, but who inserts different conditions, the person signing it is not bound thereby: *Richards v. Day*, 137 N. Y. 183; 33 Am. St. Rep. 704, and note with the cases collected. See, also, *Taylor County v. King*, 73 Iowa, 153; 5 Am. St. Rep. 666, and note.

KANSAS FARMERS' FIRE INSURANCE COMPANY v. SAINDON.

[52 KANSAS, 486.]

INSURANCE—MISDESCRIPTION OF PREMISES.—The fact that a policy of insurance on a dwelling-house misdescribes the land on which the dwelling is situated does not affect the risk nor render the policy void.

INSURANCE—LIABILITY OF COMPANY FOR FALSE ANSWERS OF AGENT.—If the agent of an insurance company makes, or fills in, false answers in an application for insurance, without the knowledge or consent of the insured, the company cannot avoid payment of a loss on account thereof.

INSURANCE—CONDITION AGAINST ENCUMBRANCES—RENEWAL OF MORTGAGE. The renewal of mortgages existing on property at the time it is insured does not vitiate the policy nor cause a breach of its condition against future encumbrances during the term of the policy and before loss without notice to, and the consent of, the company.

INSURANCE—AGENCY, WHAT CONSTITUTES, AND LIABILITY THEREFOR. An insurance company by issuing its policy on an application taken by a party who requested the insured to insure, fixed the amount of premium, made inquiries relative to the property, delivered the policy, and received a commission for his services, makes him its agent, as to that policy, even if he was not so before, and it is estopped from disowning such agency in case of loss.

ACTION to recover fire insurance. Judgment for plaintiff, and defendant appealed.

Stambaugh and Hurd, for the plaintiff in error.

Pulzifer and Alexander, for the defendant in error.

492 HORTON, C. J. The insurance company moved to require plaintiff below to make his petition more definite and certain, by stating specifically what answers to questions in the application, which had been transcribed on the policy, were false and not his own answers. This motion the court denied.

1. It is doubtful whether the exception of the company can be considered, because the petition in error does not specially assign this ruling as error; but, if it were considered, the reply subsequently filed cured the indefinite or defective allegations of the petition, as it set forth specifically all of the facts claimed by the plaintiff below concerning the application and the answers to the questions therein stated. All of the pleadings may be considered together, if any allegation in the petition is urged as insufficient. Therefore, if any error was committed in the ruling referred to, in view of the reply, it cannot be regarded as prejudicial.

493 2. Upon the trial, after the jury was impaneled, and when plaintiff below offered his first witness, objection was made to the introduction of any testimony under the petition, for the reason that it did not state facts sufficient to constitute a cause of action. The principal contention was that the petition itself disclosed the fact that the policy did not properly describe the real estate upon which the dwelling-house was situated. The land was misdescribed in the policy, but this misdescription would not affect the risk or render the policy void: *American Cent. Ins. Co. v. McLanathan*, 11 Kan. 533; *Mumper v. Kelley*, 43 Kan. 256; *State Ins. Co. v. Schreck*, 27 Neb. 527; 20 Am. St. Rep. 696; *Phenix Ins. Co. v. Gebhart*, 32 Neb. 144.

3. It is next contended that as many of the answers concerning other insurance, prior encumbrances, and stovepipes in the written application were untrue the policy was rendered void thereby. It appears from the evidence that the plaintiff below could not read nor write; that the application was signed with a mark only; that the applicant made no false statements or answers; that the application was filled in by E. D. Pelletier, who sent the same to the insurance com-

pany, and received the policy from plaintiff below. Therefore, if Pelletier was the agent of the company, and made or filled in the false answers without the knowledge or consent of the plaintiff, the company cannot avoid the payment of the loss on account of them: *Sullivan v. Phenix Ins. Co.*, 34 Kan. 170; *German Ins. Co. v. Gray*, 43 Kan. 497; 19 Am. St. Rep. 150. In this connection it is suggested that the trial court committed error in permitting plaintiff below to testify that he never signed the application. The question was not objected to, but the company moved to strike out his answer after it had been received. The execution of the application, as it was submitted to the jury, was not in issue. The court, in its instructions, treated the application as if it had been signed, and informed the jury that "if such agent relied on the representations of the plaintiff, if he made any, and such representations were false, and deceived the agent as to the true condition of the property, ⁴⁹⁴ whether with reference to encumbrances or otherwise, and a loss occurred, the plaintiff could not recover. But if the plaintiff stated all the answers truthfully, and the agent wrote them falsely, or if the agent, by his own examination, knowledge, or information of the premises, without reference to the statements of the plaintiff, if any, filled out the application, then the company is bound thereby, whether the application was truthful and correctly filled out or not; for being the act of the company, through its agent, if not correct, the company, and not the plaintiff, must bear the loss."

4. It is further contended that as the property insured was mortgaged during the term of the policy and before the loss, without notice to, or the consent of, the company, the policy by the terms thereof became void. It appears from the evidence that the subsequent mortgages were given to the officers of the bank, who held the original mortgages, and were simply renewals of, or in lieu of, mortgages in existence at the time the application was taken and the policy issued, with additional interest. Such renewals did not vitiate the policy nor cause any breach of its condition. There was a conflict in the evidence whether the mortgages were renewals only, but the jury were the judges of the weight and credibility of the witnesses, and under instructions of the court have settled that matter in favor of the plaintiff below: *Bowlus v. Phenix Ins. Co.*, 133 Ind. 106; *Russell v. Cedar Rapids Ins. Co.*, 71 Iowa, 69; *Russell v. Cedar Rapids Ins. Co.*, 78 Iowa, 216; *New*

Orleans Ins. Assn. v. Holberg, 64 Miss. 51; *McNamara v. Dakota etc. Ins. Co.*, 1 S. Dak. 342.

5. It is also contended that Pelletier was not the agent of the insurance company, as his agency had terminated in February, 1887, before the application for the policy was taken; therefore that the trial court committed error in instructing the jury that "the company having issued its policy on the application taken by Pelletier, made him its agent for that purpose, even if he was not so before." At one time E. D. Pelletier was the solicitor for the insurance company. After his agency terminated, he retained printed blanks of the company which had been furnished him while he was solicitor.

⁴⁹⁵ On the back of the application filled up was indorsed: "E. D. Pelletier, solicitor." Pelletier requested the plaintiff to insure, fixed the amount of premium, made inquiries relative to the dwelling-house, and transmitted the application to the company. The company issued the policy, and paid Pelletier a commission of twenty-five per cent for his services. The policy was sent to him for delivery. The acts of Pelletier in soliciting the insurance, and taking the application on a blank of the company having been clearly accepted by the company, are such a ratification as is equivalent to full authority in the first instance. Having accepted Pelletier's services as solicitor, and having paid him for the same, the insurance company cannot now disown his agency: *Babcock v. Deford*, 14 Kan. 408; *Waterson v. Rogers*, 21 Kan. 529; *McArthur v. Home Life Assn.*, 73 Iowa, 336; 5 Am. St. Rep. 684; *Abraham v. North German Ins. Co.*, 40 Fed. Rep. 717.

The trial court committed no error in refusing the two instructions prayed for. The first instruction omitted all reference to the false answers having been written in the application by Pelletier without the knowledge or consent of the plaintiff. The second instruction, concerning the subsequent mortgages, was faulty, in not excepting renewals of prior mortgages. There are some other matters referred to in the briefs, but they do not merit discussion.

The judgment will be affirmed.

All the justices concurred.

INSURANCE.—MISDESCRIPTION OF THE PREMISES ON WHICH PROPERTY INSURED is situated will not prevent a recovery in case of loss of the property by fire: *Phenix Ins. Co. v. Gebhart*, 32 Neb. 144; *State Ins. Co. v. Schreck*, 27 Neb. 527; 20 Am. St. Rep. 696. *Contra*: See *Collins v. St. Paul etc. Ins. Co.*, 44 Minn. 440.

INSURANCE—AGENCY—WHAT CONSTITUTES, AND LIABILITY THEREFOR. These questions are thoroughly discussed in *Hahn v. Guardian Ins. Co.*, 23 Or. 576; 37 Am. St. Rep. 709, and note with the cases collected. See, also, the extended note to *Clark v. Union Mut. etc. Ins. Co.*, 77 Am. Dec. 724.

POUNDS v. RODGERS.

[52 KANSAS, 558.]

TAX SALES, LAW GOVERNING—RETROACTIVE STATUTE.—The sale of land for delinquent taxes constitutes a contract between the purchaser and the state, the terms of which are to be found in the law then in force, and a subsequent statute reducing the rate of interest on the tax certificate, or extending the time of redemption, does not apply to prior sales.

TAX SALES, LAW GOVERNING.—All matters relative to the sale and conveyance of land for taxes under any prior statute must be completed according to the laws under which they originated, the same as if such laws remained in force, irrespective of any subsequent statute on the subject.

James A. Troutman, for the plaintiff.

Morton and Clark, for the defendants.

559 HORTON, C. J. This is an action brought to compel defendant, the county treasurer of Shawnee county, to accept a tender made by plaintiff, and execute to him a certificate of redemption of certain land sold at the tax sale of September 6, 1892, for the taxes of 1891. At the time of the tax sale the law in force as to redemption provided that any owner may, at any time before the execution of a tax deed, redeem any land by paying to the treasurer of the county where such land is sold, for the use of the purchaser, the amount for which the land was sold, and all subsequent taxes and charges thereon, with interest at the rate of twenty-four per cent per annum on the amount of the purchase money from the date of sale, and the same rate on all subsequent taxes paid thereon. Section 2, chapter 110, Laws of 1893, reduces the rate of interest to be paid on redemption to fifteen per cent, and took effect May 18, 1893. The tender of plaintiff was based upon a computation of interest upon the amount for which the land was sold, from the sale day to May 18, 1893, at the rate of twenty-four per cent, interest from that date at the rate of fifteen per cent, and interest on the subsequent taxes paid by the purchaser at the rate of fifteen per cent from the date of payment.

The question is, whether the redemption in this case is to be under the law of 1893 or the law in force at the time of the tax sale. The sale of land for delinquent taxes, under the statute, constitutes a contract between the purchaser and the state, the terms of which are found in the law then in force: *Adams v. Beale*, 19 Iowa, 61; *Rambo v. Campbell*, 560 8 Mo. App. 581; *Fleming v. Roverud*, 30 Minn. 273; *McCann v. Merriam*, 11 Neb. 241; *Moody v. Hoskins*, 64 Miss. 468; *State v. Foley*, 30 Minn. 350; *Boyd v. Holt*, 62 Ala. 296. In this case the state, by the terms of the statute, contracted with the purchaser that he shall be entitled to interest on his own investment at the rate of twenty-four per cent per annum, up to the time of a redemption, and, if not redeemed within three years, to a tax deed. The transaction being a contract, there would be an equal violation of obligation in reducing the rate of interest on the tax certificate as in extending the time of redemption.

As to cases of an attempted extension of time of redemption, see *Robinson v. Howe*, 13 Wis. 341; *State v. McDonald*, 26 Minn. 145; *Merrill v. Dearing*, 32 Minn. 479; *Goenen v. Schroeder*, 8 Minn. 387. The supreme court of South Dakota has recently held that "the sale of land for delinquent taxes under the statute constitutes a contract between the purchaser and the state, the terms of which are found in the law then in force, and that a law extending the time of redemption [though only for sixty days] could not apply to prior sales": *State v. Fylpaa* (S. Dak., March 2, 1893), 54 N. W. Rep. 599. The case of *Morgan v. Commrs. of Miami Co.*, 27 Kan. 89, was analogous in many respects to this. In its opinion, the court distinctly recognizes the contractual relations of the purchaser and the state, and says: "Notwithstanding that in 1879 this provision of the law was materially changed, plaintiffs in error are entitled to have their money refunded under the statute existing when their rights vested. The repayment of the taxes, and the charges and interest to a purchaser at a tax sale, after the conveyance thereon has been adjudged invalid, was as much a part of the contract with such purchaser as the execution of the conveyance itself." The case of *Crawford v. Shaft*, 35 Kan. 478, is also to the same effect. Section 155, chapter 34, Laws of 1876, provides that "all matters relative to the sale and conveyance of land for taxes under any prior statute shall be fully completed according to the laws under which they originated,

the same as if such laws remained in force." Paragraph 561 6687, General Statutes of 1889, provides that no repeal of a statute shall affect any right which accrues, any duty imposed, any penalty incurred, nor any proceeding commenced under or by virtue of the statute repealed.

We are referred to the following authorities, which it is claimed decide that the terms of the former statute relating to tax proceedings may be changed at any time by the legislature: Black on Tax Titles, sec. 360; *Flinn v. Parsons*, 60 Ind. 573; *Snell v. Campbell*, 24 Fed. Rep. 880. Black merely cites the other two cases. In the Indiana case, at the time of the tax sale, the interest was six per cent. Under a subsequent statute it was provided that if the tax deed was invalid the tax purchaser should recover twenty-five per cent interest. The tax deed was executed after the new statute was enacted, and the court held that, as the deed was discovered invalid, the tax purchaser was entitled to twenty-five per cent under the new statute. That decision favors, to some extent, the contention of the plaintiff, and it is the only case we have been able to find of like import. But in the Snell case it was stated by the trial judge that "what the rule would be as against some third party not interested in the tax sale, who should, at a tax sale, bid in the property for the tax and penalty, and actually pay such amount into the treasury, is not considered or determined." That case, therefore, has no application.

Writ denied, and judgment for defendants for costs.

All the justices concurred.

TAX SALES—RETROSPECTIVE LAWS.—A statute declaring that hereafter no purchaser at a tax sale shall be entitled to a deed, unless he has complied with certain conditions in such statute, applies to sales previously made for which no deed has issued, and for which the landowner retains the right of redemption. Such statute is not retrospective, as it relates exclusively to acts to be performed after its passage: *Gage v. Stewart*, 127 Ill. 207; 11 Am. St. Rep. 116, and note. A statute providing that a purchaser of property at a tax sale must, thirty days before the expiration of the time for redemption, or before he applies for a deed, serve a notice setting forth the sale, the amount due, when the time for redemption will expire, or when he will apply for the deed, and extending the time for redemption until such notice is given is constitutional and applies to sales previously made: *Oullahan v. Sweeney*, 79 Cal. 537; 12 Am. St. Rep. 172, and note.

HOPPER v. CALHOUN.

[52 KANSAS, 703.]

MORTGAGES—ASSUMPTION OF—EVIDENCE.—To create a personal liability on the part of a grantee in a deed to pay a prior mortgage on the premises conveyed, the covenant or words used must clearly import that the obligation was intended by the grantor, and knowingly assumed by the grantee. The use of the words "except a mortgage of two thousand one hundred and seventy dollars, and one interest mortgage of one hundred and ninety-five dollars, which mortgages of second party accept and agree to pay," in the deed, wholly unexplained by other evidence, are not sufficient to show an assumption of such mortgages by the grantee named in the deed; but his intent to assume their payment may be shown by evidence outside the deed.

Apt and Crawford, for the plaintiff in error.

Carskadon and Thompson, for the defendant in error.

704 ALLEN, J. C. S. Calhoun, as plaintiff, brought an action in the district court of Pratt county to foreclose a mortgage executed by F. M. Rea and wife for two thousand one hundred and seventy dollars, and to obtain a personal judgment against C. A. Hopper, plaintiff in error, for the amount of said mortgage and interest, which the plaintiff alleged that Hopper assumed and agreed to pay. Rea and wife conveyed the mortgaged property to Marion Wilson. Wilson and wife conveyed to Hopper by warranty deed. In this deed, following the covenant against encumbrances, are these words: "Except a mortgage of two thousand one hundred and seventy dollars, and one interest mortgage of one hundred and ninety-five dollars, both mortgages given to C. S. Calhoun, which mortgages of said second party accept and agree to pay." The defendant Hopper answered, denying that he had assumed payment of the mortgage. At the trial the plaintiff sought to prove, by the notary public who had taken the acknowledgment of the deed, what conversation took place between Wilson and Hopper in regard to the insertion of the clause pertaining to the mortgage. This evidence was excluded by the court, evidently because the court regarded it as unnecessary. The defendant Hopper interposed a demurrer to the plaintiff's testimony, which was overruled, and, no further proof being introduced, judgment was rendered in favor of plaintiff against Hopper for the amount of the mortgage and interest, and also foreclosing the mortgage against the other defendants.

While various matters are discussed in the briefs, the only one we deem it necessary to consider is, whether the deed which was introduced in evidence, without any explanation or showing as to the facts surrounding the transaction, and without any proof of a mistake on the part of the scrivener in writing this clause in the deed, contains such an assumption of the debt as will authorize the court to enter judgment on ⁷⁰⁵ it against the grantee in favor of the holder of the mortgage. In the case of *Holcomb v. Thompson*, 50 Kan. 598, it was held that "to create a personal liability on the part of a grantee in a deed to pay a prior mortgage or lien on the premises conveyed, the covenant or words used therein must clearly import that the obligation was intended by the grantor, and knowingly assumed by the grantee. Where a grantee of land takes the same subject to a certain mortgage he does not thereby assume any personal liability, but simply takes the land charged with the payment of the mortgage debt."

In that case the words which it was claimed amounted to an assumption by the grantee were "excepting note for two thousand dollars, dated April 21, 1887, to M. C. Holcomb, with eight per cent interest from date, and with said mortgage for two thousand dollars, the said . . . assumes and . . . agrees to pay." Can we say that the language of the deed now under consideration imports clearly an assumption by the grantee of the mortgage debt? The language used certainly is not clear. In order to make it an assumption by the grantee we must strike out the word "of," and make the word "party" the subject of the verbs "accept and agree" instead of the object of the preposition "of," as they appear to be from the reading of the deed. Under the rule declared in *Holcomb v. Thompson*, 50 Kan. 598, we do not feel at liberty to make, by interpretation merely, such a radical change in the language of the deed. It was competent for the parties to show, by oral testimony, the facts surrounding the transaction, and, under proper pleadings, to prove that the insertion of the word "of" was a mistake of the scrivener, or to show by any competent evidence the real agreement of the parties. The assumption of the payment of the mortgage on the land conveyed need not necessarily be in writing: Jones on Mortgages, sec. 750.

We think the court erred in excluding the testimony of the notary public. We cannot, however, in aid of the judgment

rendered by the court, assume that the testimony offered would have upheld the judgment: *Schmucker v. Sibert*, 18 706 Kan. 104; 26 Am. Rep. 765. We think the deed, unexplained, fails to show a clear assumption of the mortgage debt by the grantee. As this compels a reversal of the judgment, we deem it unnecessary to specially consider the other errors alleged, but perceive no other substantial error.

The judgment is reversed, and a new trial ordered.

All the justices concurred.

VENDOR AND PURCHASER—ASSUMPTION OF MORTGAGE BY LATTER—EVIDENCE.—The assumption of a mortgage debt by the purchaser of land may be shown by parol evidence: *Bensieck v. Cook*, 110 Mo. 173; 33 Am. St. Rep. 422. See, also, the extended note to *Wolbert v. Lucas*, 49 Am. Dec. 579.

FIRST NATIONAL BANK OF CLAY CENTRE v. BEEGLE.

[52 KANSAS, 79.]

CROPS—SEVERANCE.—A CONVEYANCE OF LAND either by voluntary deed or judicial sale, without reservation, does not pass the ripened crops then on the land, and a sale or mortgage of such ripened crops operates as a severance of them from the land.

CROPS ON MORTGAGED PREMISES—TO WHOM BELONG ON FORECLOSURE.—The sale by a mortgagor, prior to a foreclosure sale of the mortgaged land, of a ripened crop standing thereon, passes the title to the crop to the vendee of the mortgagor as against the mortgagee or the purchaser at such foreclosure sale.

Harkness and Godard, for the plaintiff in error.

C. C. Coleman, and Anthony and Stackpole, for the defendant in error.

710 JOHNSTON, J. S. D. Beegle brought an action against the First National Bank of Clay Centre, Kansas, alleging that it had wrongfully converted five thousand bushels of corn belonging to the plaintiff, of the value of twelve hundred and fifty dollars, for which sum judgment was demanded. The corn was grown upon mortgaged land in the year 1889. The crop was planted and cultivated by F. M. Tuthill, who was the owner of the land prior to September 30, 1889, and upon which he had given a mortgage that was foreclosed by the bank. The judgment of foreclosure was rendered January 26, 1889, under which a sale was made to the bank on September 30, 1889. No reservation of the crop was made at the

sale, which was confirmed November 26, 1889. Plaintiff Beegle claimed and offered testimony to prove that he purchased the corn from Tuthill after it had fully matured, and that the harvesting of the same began before the sheriff's sale, and continued uninterruptedly until about the 1st of November, and that the purchase was made in good faith and for a valuable consideration. The testimony was somewhat conflicting in regard to the maturity of the corn on September 30, 1889, when the judicial sale occurred, and as to the *bona fides* and absolute character of the sale of the corn. The jury, after being properly instructed, found generally in favor of the plaintiff upon all the issues, and this finding effectually settles the controversy.

The contention of the plaintiff in error is, that as the corn was standing in the field, unhusked, the title thereto passed to the ⁷¹¹ bank by virtue of the foreclosure sale. It has been clearly settled in this state that a conveyance of land, either by voluntary deed or judicial sale, without reservation, carries all growing crops with the title to the land. This rule only applies to crops which are immature and have not ceased to draw nutriment from the soil at the time of sale, and is not applicable to crops that are ripe and ready for harvest. This distinction has been carefully recognized in all the cases where the subject was considered: *Garanfio v. Cooley*, 33 Kan. 137; *Beckman v. Sikes*, 35 Kan. 120; *Caldwell v. Alsop*, 48 Kan. 571; *Goodwin v. Smith*, 49 Kan. 351; 33 Am. St. Rep. 373; *Missouri Valley Land Co. v. Barwick*, 50 Kan. 57. When the crops mature they can no longer be regarded as a part of the realty, and hence do not pass to the purchaser of the land. As the ripened crop possesses the character of personalty, the fact that it rests upon the land, unsevered, is of little consequence. If the severance of such a crop was at all material, it had in legal effect been severed through the sale by Tuthill to the plaintiff. The mortgage or sale of a ripened crop at least operates as a constructive severance of the same from the land: *Caldwell v. Alsop*, 48 Kan. 571; *Willis v. Moore*, 59 Tex. 628; 46 Am. Rep. 284; 2 Freeman on Executions, 349.

None of the errors assigned by plaintiff in error can be sustained, and hence the judgment of the district court will be affirmed.

All the justices concurred.

CROPS—WHETHER PASS UPON CONVEYANCE OF LAND.—A grantor's interest in growing crops passes by an absolute deed of the soil without any express reservation of the growing crop: *Smith v. Leighton*, 38 Kan. 544; 5 Am. St. Rep. 778, and note; *Gibbons v. Dillingham*, 10 Ark. 9; 50 Am. Dec. 233, and note; *Backenstoss v. Stahler*, 33 Pa. St. 251; 75 Am. Dec. 592, and note; *Turner v. Cool*, 23 Ind. 56; 85 Am. Dec. 449. *Contra*: See *Smith v. Johnston*, 1 Penr. & W. 471; 21 Am. Dec. 404, and note. Growing crops not belonging to the vendor of land do not pass by a sale of the land: *Barrett v. Choen*, 119 Ind. 56; 12 Am. St. Rep. 363.

CROPS—TO WHOM BELONG UPON EXECUTION SALE OF LAND.—As between a purchaser of land at a foreclosure sale and the mortgagor's tenant, crops planted by the latter and matured when the deed is executed, do not pass by the sale: *Hecht v. Dettman*, 56 Iowa, 679; 41 Am. Rep. 131, and note. Upon a sheriff's sale of land, if the judgment defendant is suffered to remain in possession and to grow crops on the land, neither the purchaser nor the vendee of his title may enter and remove any portion of the crops so grown: *Potter v. Lambie*, 142 Pa. St. 535; to the same effect, see *Killebrew v. Hines*, 104 N. C. 182; 17 Am. St. Rep. 672. The sale of land under a deed of trust carries with it the growing crops sown by the mortgagor: *Hayden v. Burkemper*, 101 Mo. 644; 20 Am. St. Rep. 643, and note. For a further discussion of this question, see the note to *Goodwin v. Smith*, 33 Am. St. Rep. 376, and the extended note to *Crews v. Pendleton*, 19 Am. Dec. 752.

ROE v. ROE.

[52 KANSAS, 724.]

DIVORCE—ALIMONY—RES JUDICATA.—A valid decree of divorce obtained by a husband from his wife in one state, without provision with reference to property or alimony, is a bar to an action brought long afterward by the wife in another state to obtain a judgment of divorce and for alimony, or for alimony alone, in the absence of proof that the law of the former state is different from that of the latter.

DIVORCE—RES JUDICATA.—A final decree of divorce settles all property rights of the parties, and bars a subsequent action by either party to determine any question of alimony or property rights which might have been settled by such decree, and a decree on service by publication is as effectual as where personal service is made.

C. A. Cox, for the plaintiff in error.

S. M. Porter, for the defendant in error.

725 ALLEN, J. This action was commenced by Adelia Roe, as plaintiff, in the district court of Montgomery county, on the eighteenth day of October, 1884, to obtain a divorce from the defendant, and the custody of a minor child. The only service then attempted on the defendant was by publication soon thereafter. Nothing further appears to have been done in the case until the thirty-first day of July, 1889, when an amended

petition was filed, praying for suit money, custody of said child, and for a divorce and alimony. On the eighth day of August, 1889, a summons was issued and personally served on the defendant, in Neosho county, Kansas, where he had resided since the fall of 1881. The defendant's answer was filed on the 10th of September, 1889, and denies, generally, the allegations of the petition. The case was tried in March, 1890. The plaintiff testified that she was married to the defendant on the twenty-first day of April, 1877, which was Saturday; that the defendant stayed with her, at her father's house, on the following night and Sunday, and that he left on Monday morning, and had never lived with her since. On the 27th of July following, the child referred to in the pleadings was born. The defendant went to Colorado soon after leaving the plaintiff, and on the twenty-second day of September, 1881, obtained a judgment of divorce from the plaintiff in the county court of Conejos county, Colorado, on a service by publication. He then returned to Kansas. In the fall of 1882 the defendant was married to Miss Perry, by whom he has four children.

One of the principal questions litigated at the trial was as to whether the plaintiff had been married before she was married to the defendant. It appears from the testimony of the plaintiff herself that she lived and cohabited with one John McAllister for more than a year, when she was fifteen or sixteen years ⁷²⁶ old; but she testifies that they were not married, and that the defendant was informed with regard to it before their marriage. At the conclusion of the trial the court made special findings of fact, among which are findings that the parties were married, as alleged in the plaintiff's petition; that at the time of the marriage the plaintiff was pregnant with a child, of which the defendant was the father; that the defendant instituted an action in Colorado to obtain a divorce on the ground of previous marriage and adultery on her part; that the plaintiff in this action had no actual notice of the pendency of said case; that a decree of divorce was granted in said case; that said decree was obtained by false testimony offered by the defendant; that at the time the defendant returned to Kansas he had property of the value of about two hundred and fifty dollars. The court thereupon, as a conclusion, sustained the Colorado decree of divorce, and granted the plaintiff two hundred dollars as alimony, and also adjudged that he pay the costs. Of this judgment he complains. While the court found that the

Colorado divorce was obtained by false testimony, it did not find that the plaintiff in that action knew that such testimony was false, and inasmuch as the trial court sustained the validity of the Colorado decree, all presumptions are in its favor. More than that, however, the validity of that decree and of the subsequent marriage of the defendant are not challenged in this court. We then are left only to determine the question whether a decree for alimony can be sustained under the circumstances, where it is conceded that the defendant had obtained a valid decree of divorce before his second marriage. The question litigated on the trial as to whether the plaintiff had a husband living at the time of her marriage with the defendant was resolved by the trial court in favor of the plaintiff, on conflicting testimony. We therefore need not consider that matter.

The Colorado statutes, with reference to the granting of divorce and alimony, were not introduced in evidence at the trial. We must then assume that the law of that state is the same as the law of Kansas: *Furrow v. Chapin*, 13 Kan. 107; *Kansas Pac. Ry. Co. v. Cutter*, 16 Kan. 568; *French v. Pease*, 10 ⁷²⁷ Kan. 51. The Colorado decree merely grants a divorce, and contains no provision whatever with reference to property. It then only remains to determine whether, under the laws of Kansas, long after a decree of divorce has been rendered, after one of the parties has married and become the father of a family of children, the divorced wife can prosecute an independent action and obtain a judgment for alimony. Under section 646 of the Civil Code, it is provided:

"If the divorce shall be granted by reason of the fault or aggression of the wife, the court shall order restoration to her of the whole of her property, lands, tenements, and hereditaments owned by her before, or by her separately acquired after, such marriage, and not previously disposed of, and also such share of her husband's real and personal property, or both, as to the court may appear just and reasonable; and she shall be barred of all right in all the remaining lands of which her husband may at any time have been seised."

Section 647 contains the provision that "a divorce granted at the instance of one party shall operate as a dissolution of the marriage contract as to both, and shall be a bar to any claim of the party for whose fault it was granted in or to the property of the other, except in cases where actual

fraud shall have been committed by or on behalf of the successful party."

In the case of *Lewis v. Lewis*, 15 Kan. 181, it was held: "Where a decree of divorce was duly and legally entered, after service by publication, and the mailing of a copy of the petition and publication notice, as required by section 641 of the code, held that the defendant could not come in under section 77 of the code, and upon the showing of want of actual notice have the decree set aside, and be let in to defend.

"Where the decree of divorce contained no other order concerning property than one barring defendant of all right and interest in the property of plaintiff, held, that this order must stand with the decree, and, the decree being undisturbed, the order could not be set aside."

This case was decided long before the amendment rendering it unlawful for either of the parties to a judgment of divorce to marry within six months after the rendition of the judgment. It is the general policy of the law, strongly adhered to by this court in its prior decisions, to require every question properly involved in any suit to be disposed of by the judgment finally rendered in the case: *Board of Commrs. v. Welch*, 40 Kan. 767; *Bierer v. Fretz*, 37 Kan. 27; *Wichita etc. R. R. Co. v. Beebe*, 39 Kan. 465; *Westbrook v. Mize*, 35 Kan. 299; *Chicago etc. R. R. Co. v. Board of Commrs.*, 47 Kan. 766. Under the law of Kansas, the court rendering judgment in an action for divorce is authorized, on a proper showing, to grant alimony, whether the divorce be allowed or not. If the divorce is granted, it operates as an absolute dissolution of the marriage tie. Whatever orders with reference to alimony or a division of the property are desired by either party may then be considered and determined by the court. If they may be so considered and determined, and a party neglects to require such determination, the judgment is as full and complete a bar as if the question had been fully tried and determined. Within the case of *Lewis v. Lewis*, 15 Kan. 181, though the rule declared may sometimes work great hardships, a judgment on service by publication is as effectual as where personal service is made. We conclude, then, that, under the evidence and the finding of the court sustaining the Colorado divorce, the parties were not husband and wife either at the time the suit was commenced or when it was finally determined, and that the court was without power

to grant alimony to the plaintiff while sustaining the Colorado divorce made so long before.

The judgment is reversed, with the direction to enter a judgment in favor of the defendant on the findings of the court.

All the justices concurred.

MARRIAGE AND DIVORCE—CONCLUSIVENESS OF DECREE OF DIVORCE.—A decree in an action of divorce between the same parties for the same cause of action bars the re-examination of the same facts in a subsequent case: *Farquar v. Farquar*, 20 Or. 69; 23 Am. St. Rep. 93, and note. A decree rendered in an action for divorce dismissing the libel therefor upon a hearing upon the merits is a bar to a subsequent libel for the same cause of action between the same parties: *Brown v. Brown*, 37 N. H. 536; 75 Am. Dec. 154. A subsequent decree of divorce does not vacate a previous decree for alimony due anterior to its rendition: *Harrison v. Harrison*, 20 Ala. 629; 56 Am. Dec. 227. A decree of divorce against a nonresident defendant, who appears to have been served with process, where the complainant was within the jurisdiction, though effective in a sister state so far as the dissolution of the marriage is concerned, may not be so, perhaps, with respect to any allowance therein directed to be paid by the defendant: *Harding v. Alden*, 9 Greenl. 140; 23 Am. Dec. 549, and note; *Rigney v. Rigney*, 127 N. Y. 408; 24 Am. St. Rep. 462, and note. This question is thoroughly treated in the monographic note to *Boykin v. Rain*, 65 Am. Dec. 355-361.

BERRY v. KANSAS CITY, FORT SCOTT, AND MEMPHIS RAILROAD COMPANY.

[52 KANSAS, 759.]

APPELLATE PRACTICE—DIRECTING JUDGMENT.—A case made containing all the pleadings, the general verdict, the special findings, the motions for judgment, and for a new trial, and so much of the proceedings as may be necessary to present the error complained of, is sufficient to authorize the appellate court to direct what judgment the lower court should have rendered in the case.

CONSTITUTIONAL LAW—AMENDMENT OF STATUTE—CHANGE OF REMEDY.—

When a statute provides that the personal representative of a person killed by the wrongful act of another may maintain an action therefor, for the exclusive benefit of the widow and children, or the next of kin of the deceased, and a subsequent supplementary act merely provides how that action may be enforced for the benefit of the family of a person so killed, when the residence of the deceased person, at the time of his death, is in another state, or when no personal representative has been appointed, such supplementary act does not create a new cause of action, but is simply a change of remedy; nor is it in conflict with a constitutional provision providing that "no law shall be revised or amended, unless the new act contains the entire act revised, or the section or sections amended, and the section or sections amended shall be repealed."

RAILROADS — CONSOLIDATION. — When one railroad is consolidated with another, or others, under a new name, it ceases to exist as a corporation.

RAILROADS — CONSOLIDATION — LIABILITIES. — When two or more railroad companies are consolidated under the statutes of a state, the new, or consolidated, company is answerable for the obligations of the old, or constituent, company, or companies, including torts, in the absence of all evidence or stipulations to the contrary.

ACTION to recover damages for wrongful death. W. Y. Berry, an engineer of the Missouri Pacific Railway Company, which company at that time was operating the Missouri, Kansas, and Texas Railway, was killed while on duty in Bourbon county, Kansas, by a train of the Kansas City, Fort Scott, and Gulf Railroad Company, which, four months after the accident, was consolidated with other railroads under the laws of Kansas, and became the Kansas City, Fort Scott, and Memphis Railroad Company. At the time of the accident, Berry was a resident of Sedalia, Missouri, where his wife and two children resided. He died intestate, and no administrator of his estate was ever appointed in Kansas or Missouri. In April, 1889, his widow brought this action against the Kansas City, Fort Scott, and Memphis Railroad Company, alleging that her husband was killed by the negligent operation of the Kansas City, Fort Scott, and Gulf Railroad. Mrs. Berry obtained a general verdict for five thousand dollars damages, and the jury also returned the following special findings:

“Q. 1. Was the plaintiff the wife of William Y. Berry? A. Yes. Q. 2. Was said William Y. Berry killed on December 24, 1887? A. Yes. Q. 3. Did the said William Y. Berry die without leaving any will? A. Yes. Q. 4. Were the plaintiff, Mrs. Berry, and her husband, on December 24, 1887, up to the time of his death, residents and citizens of the state of Missouri? A. Yes. Q. 5. What was the age and occupation of the said William Y. Berry at the time of his death? A. Age, 32 years; occupation, locomotive engineer. Q. 6. What wages, as engineer, did said William Y. Berry receive up to and prior to his death? A. At an average of one hundred and thirty dollars per month. Q. 7. Did the deceased, William Y. Berry, maintain his said wife and children before his said killing? A. Yes. Q. 8. Was any executor or administrator appointed of the estate of William Y. Berry, deceased? A. No. Q. 9. What was the condition of the health of said William Y. Berry at the time of his death? A. Good. Q. 10. In what county and state did the death of William Y. Berry

take place, on December 24, 1887? A. Bourbon county, Kansas. Q. 11. Was the Kansas City, Fort Scott, and Gulf Railroad constructed and in operation in Bourbon county, Kansas, on December 24, 1887? A. Yes. Q. 12. Did the Kansas City, Fort Scott, and Gulf Railroad Company consolidate with other railroad companies in April, 1888, and thereby form the Kansas City, Fort Scott, and Memphis Railroad Company? A. Yes. Q. 13. Was the Kansas City, Fort Scott, and Gulf Railroad Company operating the Kansas City, Fort Scott, and Gulf Railroad on December 24, 1887? A. Yes. Q. 14. If said William Y. Berry was killed by the negligence of the Kansas City, Fort Scott, and Gulf Railroad Company, on December 24, 1887, in what did that negligence consist? A. 1. By not bringing their train to a full stop before reaching a crossing; 2. By running at too high rate of speed on approaching a grade crossing; 3. By the head brakeman not being at his post on approaching a crossing. Q. 15. If William Y. Berry was guilty of any contributory negligence, in what did it consist? A. He was not guilty of any contributory negligence." The defendant objected to the reception of the general verdict, and the special questions and answers, and the court declined to receive or record them as a verdict, but permitted them to be filed, that the whole proceedings might appear on the record. The defendant then filed the following motion: "And now that the jury has brought in a general verdict for the plaintiff, together with certain answers to special questions, propounded by plaintiff's counsel, the defendant asks the court to instruct and require the jury to bring in a general verdict in favor of defendant, upon the unquestioned law of the case. Wallace Pratt, W. C. Perry, C. W. Blair, defendant's attorneys." Plaintiff objected to the hearing or presentation of said motion. The court overruled the objection. Plaintiff excepted, and the court thereupon ordered the jury to find the following verdict for defendant: "We, the jury, find for the defendant. W. H. Gillett, foreman." The plaintiff then filed a petition to set aside such general verdict, moved the court to render judgment in her favor on the special findings and general verdict found in her favor, and then moved for a new trial. All of such motions were in turn overruled. Judgment for defendant, and plaintiff appealed.

E. F. Ware, for the plaintiff in error.

Wallace Pratt, W. C. Perry, and C. W. Blair, for the defendant in error.

⁷⁶⁶ HORTON, C. J. We are called upon to review the action of the trial court upon the case made. It is insisted by the counsel of the railroad company that the petition in error should be dismissed because the testimony produced upon the trial is not preserved in the record, and therefore that this court cannot determine whether the trial court committed any error in directing a verdict for the company. The testimony is not before us, and, if the case made did not contain ⁷⁶⁷ statements explanatory of the rulings of the trial court, then, upon the authorities cited in behalf of the company, the motion to dismiss would have to be sustained. Section 547 of the Civil Code, however, specifically provides that—

“A party desiring to have any judgment or order of the district court, or a judge thereof, reversed by the supreme court, may make a case containing a statement of so much of the proceedings and evidence or other matters in the action as may be necessary to present the errors complained of to the supreme court.”

In this case, the pleadings, the general verdicts, the special findings, the motions, and the judgment are all properly incorporated in the record, and, in addition thereto, a statement is contained of so much of the proceedings as is necessary to present the errors complained of. It appears from the case made that, upon the trial, the plaintiff introduced her testimony; that the railroad company demurred thereto; that the demurrer was overruled; that the railroad company then introduced its evidence; that the plaintiff introduced her evidence in rebuttal; and that, at the close of all the testimony, the trial judge stated “he had made up his mind the plaintiff could not recover, under the law of the case, and that he should instruct the jury to find a verdict for the railroad company.” The plaintiff’s counsel then asked “the court that, to avoid another expensive trial the jury be permitted to make special findings of fact in the case, in order that the whole facts of the case might go to the supreme court, to the end that, if the law and the testimony authorized the judgment in favor of the plaintiff, the supreme court could, upon such facts and the law, direct the judgment to be given.”

The court granted this request, "and directed such course to be pursued." Thereafter, the jury retired, and after agreeing upon a general verdict and the answers to special questions, returned the same into court. When the jury returned their verdict and the answers to special questions, no motion was made to set the general verdict aside, or to set aside any of the special answers. The counsel of the railroad ⁷⁶⁸ company requested the trial court, notwithstanding such general verdict and special findings, to direct a general verdict in favor of the defendant, "upon the unquestioned law of the case." We must therefore assume, upon the record, that "the whole facts of the case" were presented in the court below, and are now presented to us upon the special findings and the general verdict returned by the jury in the first instance. The trial court decided, upon the facts as presented by the jury, that the railroad company was entitled to a verdict in its favor, and acted accordingly. Therefore, the only question upon the record for us to pass upon is, What judgment should be given upon the facts of the case as found by the jury?

It is the contention of the plaintiff, under the provisions of sections 422 and 422 *a* of the Civil Code, and from the obligation of the Kansas City, Fort Scott, and Memphis Railroad Company, as successor of the Kansas City, Fort Scott, and Gulf Railroad Company, one of the constituent corporations of which it is composed, that the trial court should have rendered judgment in favor of the plaintiff, and against the railroad company, upon the general verdict first returned by the jury, and their special findings of fact. On the other hand, the railroad company insists that section 422 *a* is unconstitutional, because it is an attempted amendment of section 422 of the code, in violation of section 16, article 2, of the constitution, which ordains that "no law shall be revised or amended unless the new act contains the entire act revised or the section or sections amended, and the section or sections amended shall be repealed," and that, if section 422 *a* is constitutional it cannot affect this case, because there was no cause of action thereunder on the 24th of December, 1887, as that act was not passed until March 22, 1889—more than a year after the death of William Y. Berry. It is further claimed that the Kansas City, Fort Scott, and Memphis Railroad Company is not answerable for the debts, obligations, or torts of the Kansas City, Fort Scott, and Gulf Railroad Com-

puny in the absence of any testimony ⁷⁶⁹ tending to show that it assumed its debts, obligations, and torts.

Section 422 reads: "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

Section 422 *a* provides: "That in all cases where the residence of the party whose death has been, or hereafter shall be, caused as set forth in section 422 of chapter 80, Laws of 1868, is or has been at the time of his death in any other state or territory, or when, being a resident of this state, no personal representative is or has been appointed, the action provided in said section 422 may be brought by the widow, or, where there is no widow, by the next of kin of such deceased."

Said section 422 *a*, being section 1 of chapter 131, Laws of 1889, is not subject to the constitutional objection urged against it, for it is not an amendment of section 422. That section is still in full force, and is not repealed, but stands as it did before the act of 1889 was passed. If a personal representative has been appointed, he may still maintain the action, as provided in section 422, the same as if the act of 1889 had not passed, and hence the act of 1889 does not violate any provision of the constitution: *State v. Cross*, 38 Kan. 696. Section 422 gives an action for the exclusive benefit of the widow and children, if any, or next of kin, of the deceased person. The action must be commenced within two years, and the damages cannot exceed ten thousand dollars. That section requires that the personal representative of the deceased must bring the action, but it is not for his benefit, nor for the estate for which he acts. Section 422 *a* is supplemental. The prior ⁷⁷⁰ section grants a remedy to the families of persons killed by the wrongful act or omission of another; and section 422 *a* merely provides how that action may be enforced for the benefit of families of persons so killed, when the residence of the deceased person, at the time of his death, is in another state, or when no personal representative has been appointed. It is an act to carry into force

the cause of action created by section 422. It does not create a new cause of action. No amount of damages or any limitation is stated therein. It is simply a change of remedy. Its purpose is that the cause of action given by section 422 shall not lapse or be abortive by reason of the nonresidence of the deceased, or the nonappointment of a personal representative. Under both sections the damages must inure to the exclusive benefit of the widow and children, if any, or next of kin of the deceased. If section 422 had given the personal representative or administrator a cause of action for his own benefit, or for the benefit of the estate for which he acts, there would be much force in the argument that section 422 *a* does not affect this case. Therefore, although William Y. Berry was killed on December 24, 1887, his widow, under the provisions of section 422 *a*, can maintain this action; in other words, can enforce the cause of action given by section 422 for the benefit of herself and children: *Commissioners of Sedgwick Co. v. Bunker*, 16 Kan. 498; Wade on Retroactive Laws, secs. 24, 83, 214; Cooley's Constitutional Limitations, star pages 361, 371, 373, 581.

Paragraph 1268, General Statutes of 1889, provides, among other things, that—

“Any two or more railroad companies in this state are hereby authorized to consolidate and form one company, . . . with all the rights, powers, privileges, and immunities, and subject to all the obligations and liabilities to the state which belonged to or rested upon either of the companies making such consolidation.”

It would not be a strained construction to hold that “all obligations,” as used in the statute, compel the consolidated or new company to pay all claims, debts, or other pecuniary ⁷⁷¹ demands of each of the original companies. If obligations to the state only were intended, it would not have been necessary to have added the word “liabilities” to the state, because “liability” is defined as “the state of being liable; as, the liability of an insurer; liability to the law; responsibility, accountableness, accountability, bounden duty”; and “obligation” is also defined as “that which obligates or constrains; the binding power of a promise or a contract; a bond with a condition annexed, and a penalty for nonfulfillment. In a larger sense it is an acknowledgment of a duty to pay a certain sum or do a certain thing; responsibility, accountableness, bond of duty.” To hold that “obligations” and “liabil-

ities" are limited to the state only would be to say that the legislature was guilty of a repetition of the same meaning in different words. On the other hand, if "obligations" and "liabilities" are both given their full force and effect, "obligations" may be construed as embracing all pecuniary duties in the way of being answerable for debts, demands, torts, etc.; "liabilities" may mean the burdens imposed by the constitution and the statutes; that is, the responsibility or bounden duty to the state under the constitution and statutes.

"Where a railroad company is consolidated with other railroad companies under a new name it ceases to exist as a corporation, and an action brought by or against such railroad company before its consolidation cannot afterwards be prosecuted by or against it in its original name": *Kansas etc. Ry. Co. v. Smith*, 40 Kan. 192.

The legislature could not have intended that a railroad company, by consolidating with other railroad companies, could thereby relieve itself of all of its debts, demands, and torts, and yet, if the theory of the railroad company is true, a railroad company, by becoming consolidated with another company, is discharged of its debts and obligations; at least, an action cannot be maintained against the old company, as it ceased to exist as a corporation after its consolidation; and, if the consolidated or new company is not answerable to creditors and others for the debts and other obligations of the ⁷⁷² old company, there is no corporation in existence against which an action can be maintained.

But even if the statute is not construed as indicated, yet, under the authorities, where two or more railroad companies are consolidated under the statutes of the state, the new or consolidated company is answerable for the obligations of the old or constituent companies, including torts, in the absence of all evidence or stipulations to the contrary. Field on Corporations, section 435, states:

"The general rule is, that the rights of creditors against the old companies revive against the new one created by the consolidation, as we have just noticed, and that it becomes substituted for the former ones. Provision is, perhaps, generally made by statute or by articles of agreement, as provided by law, for the payment of the creditors, and the satisfaction of the obligations of the consolidating companies; and sometimes these provide that such companies shall continue for the purpose of adjusting their outstanding obligations, includ-

ing their torts. But even where no such provision is made, but the consolidation is lawfully consummated, the new company has been held liable to all obligations of the former ones, from the very necessity of the case, and to prevent the failure of justice."

In *Thompson v. Abbott*, 61 Mo. 176, it was decided that "where one corporation goes entirely out of existence by being annexed to, or merged in, another, where no arrangements are made respecting the property and liabilities of the corporation that ceases to exist, the subsisting corporation will be entitled to all the property, and answerable for all the liabilities": See, also, 3 Wood's Railway Law, sec. 486, p. 1680; Morawetz on Private Corporations, secs. 809, 955, 956; *Chicago etc. R. R. Co. v. Moffitt*, 75 Ill. 524.

The case of *Whipple v. Union Pacific Ry. Co.*, 28 Kan. 474, is cited, to the effect that the new or consolidated company cannot be held for the obligations of either of the constituent companies, "only by and to the extent of an expressed stipulation." That language was used in the opinion of Mr. Justice Brewer, speaking for the court, upon the facts disclosed ⁷⁷³ in that case. The Kansas Pacific Railway Company was guilty of the wrong alleged in that case, and there was a sort of amalgamation or consolidation afterwards with the Union Pacific Railway Company under an act of Congress, but not under the statutes of Kansas. In that case it was shown upon the trial that the Kansas Pacific Railway Company did not cease to exist after its consolidation with the Union Pacific; that the old company "had not attempted to assume a new name, to change its old, or permit itself to be known by a new name," and that in the written agreement executed by the Union Pacific and the Kansas Pacific Railway Companies it was expressly provided:

"The new company hereby formed does not herein assume any separate or individual liability for the outstanding debts, obligations, and liabilities of the respective constituent companies, whose several and separate existence as to third parties shall, as respects such debts, obligations, and liabilities of every kind and nature, still continue, notwithstanding these articles of union and consolidation."

The Whipple case, therefore, does not decide, as claimed, that when two or more companies are consolidated under the statutes of this state, the new company is not liable for the obligations of the former ones, unless an expressed stipula-

tion assuming such obligations is shown to exist. That case was decided upon the facts disclosed, and not upon the absence of an agreement of the assumption of obligations. It was disposed of rightly upon the facts established, and we fully approve the decision.

Upon the whole record, our conclusion is, that the law of the case in the court below, and in this court, was and is with the plaintiff. Therefore, the trial court committed error in refusing to receive the general verdict and the special findings of the jury, and in directing another verdict, and in rendering the judgment thereon. The judgment of the district court will be reversed, and, upon the special findings and the general verdict, judgment will be directed for the ⁷⁷⁴ plaintiff, Mrs. Helen A. Berry, and against the railroad company.

All the justices concurred.

APPEAL—DIRECTING FINAL JUDGMENT.—If a cause comes before the court on an appeal from an interlocutory order, and the whole merits of the case appear, the court will make a final decree, and decide upon the whole merits of the case: *Bush v. Livingston*, 2 Caines Cas. 66; 2 Am. Dec. 316; *Le Guen v. Gouverneur*, 1 Johns. Cas. 436; 1 Am. Dec. 121. A judgment appealed from will be avoided if erroneous, and the judgment which should have been given will be rendered: *Chapman v. New Orleans etc. R. R. Co.*, 21 La. Ann. 224; 99 Am. Dec. 722, and note. Where the facts are not in dispute, and all the matters appear on the face of the record, enabling the appellate court to ascertain and declare the justice of the case, it will render such a judgment as will secure to each party his rights, instead of remanding the cause for a new trial: *McAfee v. Reynolds*, 130 Ind. 33; 30 Am. St. Rep. 194. In Illinois the appellate court may render final judgment where there is no evidence tending to prove the issues tendered, so that the trial court would have been justified in directing a verdict: *Commercial etc. Assn. Co. v. Seammon*, 126 Ill. 355; 9 Am. St. Rep. 607.

STATUTES—AMENDMENTS—SETTING OUT ORIGINAL STATUTE.—The entire statute need not be set forth in an act amending it by adding new sections or altering old ones. It is only when all the sections of a statute are amended that the entire act as amended must be set out in the amendatory statute: *State v. Thurston*, 92 Mo. 325; 1 Am. St. Rep. 720, and note. See *People v. Squire*, 107 N. Y. 593; 1 Am. St. Rep. 893; and the note to *City of Winona v. School District*, 12 Am. St. Rep. 695.

CORPORATIONS—CONSOLIDATION—EFFECT OF.—The consolidation of two corporations into one new one ends their separate existence, and vests all their effects and franchises in the new company: *Indianapolis etc. R. R. Co. v. Jones*, 29 Ind. 465; 95 Am. Dec. 654; *Louisville etc. Ry. Co. v. Blythe*, 69 Miss. 939; 30 Am. St. Rep. 599, and note; *Louisville etc. Ry. Co. v. Summers*, 151 Ind. 241. For a full discussion of this question, see the extended note to *McMahon v. Morrison*, 79 Am. Dec. 422.

CORPORATIONS—CONSOLIDATION—EFFECT AS TO LIABILITIES OF NEW COMPANY: See the extended note to *McMahon v. Morrison*, 79 Am. Dec. 426; also the note to *Pfeifer v. Sheboygan etc. R. R. Co.*, 86 Am. Dec. 754.

BERRY v. KANSAS CITY, FORT SCOTT, AND MEMPHIS RAILROAD COMPANY.

[52 KANSAS, 774.]

CORPORATIONS—CONSOLIDATION—LIABILITY OF NEW CORPORATION.—When one corporation goes entirely out of existence, by being incorporated into another under a new name, without any arrangement or agreement made respecting the property and liabilities of the corporation which ceases to exist, the corporation into which it is merged succeeds to all its property, and is answerable for all its liabilities. In such case the debts of the old corporation become, by implication, the obligations of the new corporation.

APPELLATE PRACTICE—DIRECTING JUDGMENT.—If special findings are returned by a jury under the direction of the trial court, the appellate court may direct what judgment shall be rendered upon such findings, when they are not excepted to as against the facts.

ACTION to recover damages for wrongful death caused by negligence. The facts are stated in *Berry v. Kansas City, Fort Scott, and Memphis R. R. Co.*, ante, p. 371, and the opinion herein is the one rendered on the petition for a rehearing.

Wallace Pratt, W. C. Perry, and Charles W. Blair, for the motion.

E. F. Ware, contra.

774 Per CURIAM. Upon the motion for a rehearing it is insisted again that on the record the Kansas City, Fort Scott, and Memphis Railroad Company is not liable for the wrong complained of, which was committed by the Kansas City, Fort Scott, and Gulf Railroad Company before its consolidation with the former company. We did not rest the decision in the original opinion upon the ground that the statute made the 775 new company liable for the torts of the constituent companies. It was intimated that the statute might be construed as conferring such liability, as both "obligations" and "liabilities" were used: Gen. Stats. of 1889, par. 1268. It might, perhaps, have been better to have omitted the comments upon the statute: Act of February 13, 1865; Laws of 1865, c. 44; Gen. Stats. of 1889, par. 1268. It was decided, however, that, where two or more railroad companies were consolidated under the statute, the new company is answerable for the obligations of the constituent companies, including torts, in the absence of any arrangement respecting their liabilities. This court did not decide that a consolidated company could not, by an express stipulation, limit its lia-

bility for the debts and torts of its constituent companies. It is doubtful, however, whether the new company can, by express agreement, relieve the property of the old company, which it has obtained by consolidation, from a judgment recovered against the new company by a creditor of the old company.

All of the authorities seem to agree that, "unless the statute or articles of consolidation make express provision therefor, the new corporation assumes all the liabilities of the old ones, at least in equity, to the extent of the property received by it from the old corporation": 3 Wood's Railway Law, sec. 486; *Brum v. Merchants' Mut. Ins. Co.*, 16 Fed. Rep. 140; *Wabash etc. Ry. Co. v. Ham*, 114 U. S. 587. The foundation of the liability of a consolidated corporation may rest on a statute, or on an agreement, either expressed or implied. If the statute does not provide that the new company shall assume the debts and liabilities of the constituent companies, and there is no express agreement respecting the same, the debts of the original companies follow as an incident of the consolidation, and become, by implication, the obligations of the new corporation: *Columbus etc. Ry. Co. v. Powell*, 40 Ind. 37; *Jeffersonville etc. R. R. Co. v. Hendricks*, 41 Ind. 48; *Louisville etc. Ry. Co. v. Boney*, 117 Ind. 501; *Houston etc. R. R. Co. v. Shirley*, 54 Tex. 125. In the latter case it was said: "If neither statute nor ⁷⁷⁶ agreement make mention of creditors, the consolidated corporation is held to have assumed the liabilities of its constituents."

Jones on Railroad Securities, second edition, in his note to section 364, quotes the following from *Louisville etc. Ry. Co. v. Boney*, 117 Ind. 501:

"The rule which the authorities support seems to be, that where one corporation goes entirely out of existence, by being incorporated into another, if no arrangements are made respecting the property and liabilities of the corporation that ceases to exist, the corporation into which it is merged will succeed to all its property, and be answerable for all its liabilities."

In *Whipple v. Union Pac. Ry. Co.*, 23 Kan. 474, the railway company, in its defense, offered in evidence the articles of consolidation, and these articles showed that the company did not assume any of the debts or liabilities of the constituent companies, but that the corporate existence of the companies was preserved for the purpose of adjusting all claims

and demands. If, upon the trial of this case, the railroad company had offered in its defense its articles of consolidation on file in the public records in the office of the secretary of state, it would have been shown that the articles expressly provided that the new company should "pay, perform, and discharge all the debts, duties, contracts, and obligations of every description of each of its several constituent corporations."

It is further insisted, that this court ought not to have directed judgment upon the special findings and the general verdict returned in the first instance by the jury. In support of this, it is urged that the verdict and special findings were not received or recorded, and, therefore, were without force or validity; further, that the railroad company, if judgment be entered, will be prevented from having a review of the errors of law occurring upon the trial. Other reasons are also assigned.

It is unnecessary to repeat the portions of the record contained in the former opinion. After the general verdict and "special findings had been returned by the jury, the railroad company made the following motion:

"And now that the jury has brought in a general verdict for the plaintiff, together with answers to certain questions propounded by the plaintiff's counsel, the defendant asks the court to instruct and require the jury to bring in a general verdict in favor of the defendant upon the unquestioned law of the case."

The trial court granted the motion, and, under the direction of the court, the jury then returned a verdict for the defendant. The motion of the railroad company refers to the first verdict and answers brought in by the jury, and it is the fair inference from its motion and other parts of the record that the railroad company asked the court, upon the special findings, to instruct the jury for a verdict in its favor. The plaintiff below demanded judgment upon the special findings in her favor. This was refused.

Although it is recited in one place in the record "that the court declined to receive the first verdict and special findings," yet the whole record must be considered together. The motion filed by the railroad company, and other recitations of the record, show that the jury actually returned this verdict and the special findings. They not only passed beyond the control of the jury, but were regularly presented

to the court, were filed by the order of the court, and entered of record, and therefore were actually received and recorded in the court. The former opinion will be corrected in this respect. A verdict which is not delivered is one which remains within the control of the jury. But these verdicts were delivered, and the trial court evidently considered the findings of fact unfavorable, as a matter of law, to the plaintiff below, and therefore did not render judgment in her favor. The first verdicts were not received in the sense only that judgment was not duly entered thereon. In *Bishop v. Mugler*, 33 Kan. 145, the jury separated without the consent of the justice of the peace, and the full jury were not present when the verdict was presented. The justice refused in that case to file the ⁷⁷⁸ verdict. The statute expressly provides that, in cases decided by this court, when the facts are agreed to by the parties, or found by the court below, or a referee, and when it does not appear by exception, or otherwise, that such findings are against the facts in the case, this court shall direct the trial court to render such judgment in the premises as it should have rendered on the facts agreed to or found in the case: Civ. Code, sec. 559. Whether the findings of the trial court are made with or without the consent of the parties, this court, upon review, directs what judgment should have been rendered, if the findings are not excepted to as contrary to the evidence. When the special findings of fact are inconsistent with the general verdict, the former control the latter, and the court will give judgment accordingly: Civ. Code, sec. 287. Therefore, where special findings are returned by the jury under the direction of the trial court, the judgment may be rendered upon the findings, if they are not excepted to as against the facts. The general verdict and special findings first returned show the facts found in the case. The special findings of fact were permitted to be found by the jury to avoid another expensive trial, so that, upon the review of the case, this court might have the whole facts in its possession. Cases are often brought to this court solely upon the facts found by the jury or the court, each party claiming judgment in his favor upon the findings. Parties in some cases prefer this mode of review rather than to have a new trial. In negligence cases, especially, this practice is not infrequent.

The trial court decided that the law was with the railroad company. Upon the findings of fact this court directed the

trial court to render the judgment it ought to have rendered. If the company had excepted to the findings as against the facts, a question different from the one presented would be in the case. No such exceptions are in the record. The trial judge, when he decided to submit special questions to the jury, notified the parties that this was done "that the whole facts of the case might go to the supreme court," and at the close of the trial again notified the parties to the same effect, when ⁷⁷⁹ he directed the general verdict and special findings first returned "to be filed, in order that the whole proceedings might appear on the record." With all of this notice, no exceptions were filed by either party to the special findings as against the facts.

We are satisfied with the opinion as handed down, except as to the matters referred to, and the motion for a rehearing will be denied.

CORPORATIONS—CONSOLIDATION—EFFECT OF: See *Berry v. Kansas City etc. R. R. Co.*, 52 Kan. 759; *ante*, p. 371, and note.

APPEAL—DIRECTING JUDGMENT: See *Berry v. Kansas City etc. R. R. Co.*, 52 Kan. 759; *ante*, p. 371, and note.

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CASES
IN THE
SUPREME COURT
OF
MARYLAND

HANOVER FIRE INSURANCE COMPANY v. BROWN.

[77 MARYLAND, 64.]

INSURANCE.—UNDER A CONDITION THAT AN INSURANCE SHALL BECOME VOID UPON THE ENTRY OF A DECREE OF FORECLOSURE, or upon a sale under a deed of trust, or if any change takes place in the title or possession of the property, a sale under a power contained in a mortgage, but without any decree or other judicial proceeding directing it, does not avoid the insurance if, by the law of the state, such sale must be reported to a court of equity and there confirmed before it becomes final. The sale contemplated by the policy is a consummated transaction, by which the interest of the assured is divested.

INSURANCE—CONTRIBUTION BETWEEN INSURERS.—If each of several insurers contracts to pay such proportion of the loss to result from the destruction of the insured premises as the amount insured by him bears to the whole insurance effected on the property, neither has any right to contribution from the other, nor will the payment of the whole loss by either of them discharge the liability of the other.

INSURANCE—RIGHT TO SUBROGATION.—THE PAYMENT BY ONE INSURER of more than his share of a loss, and his assignment of his right to contribution, cannot create any cause of action in favor of his assignee if each of the insurers agreed to pay only such proportion of the loss as the amount of insurance assumed by him bore to the whole amount for which insurance had been effected, because, in paying more than his share of the loss, the insurer was a mere volunteer.

PLEADING—EXTRINSIC MATTERS.—IN DETERMINING THE VALIDITY OF A PLEADING it is not competent for the court to consider any thing which does not appear on the record.

PLEADING—REFERRING TO DOCUMENTS.—A PAPER CANNOT BE INCORPORATED IN A PLEADING by reference to it. If it is desirous to show to the court the contents of a paper, this may be done by exhibiting it, or by averring the legal effect of its contents.

PLEADING.—AN IMPROPER DEPARTURE IN PLEADING TAKES PLACE WHEN the declaration is upon a policy of insurance to enforce a contract lia-

bility to the plaintiff, and the replication brings forth a new and distinct cause of action, founded on several assignments of claims for contribution alleged to be due to other insurance companies.

INSURANCE.—ASSIGNMENT OF A POLICY OF INSURANCE RESULTS FROM an indorsement thereon of "loss, if any, payable to Alexander Brown and Sons, as interest may appear," and if they are mortgagees of the property insured, they are entitled to recover for a loss, not exceeding the amount of their debt.

INSURANCE.—THE EFFECT OF AN ASSIGNMENT of a policy of insurance, when the insurer consents to it, is that a new contract arises between the insurer and the assignee, having all the terms and conditions of the policy, the assignee being substituted in place of the parties originally insured, and becoming the owner of the property at least to the extent of his interest in the property insured.

ACTION by Alexander Brown and Sons on a policy of insurance issued in October, 1890, to O. Hammond, upon a brick building and the machinery therein. The loss, by an indorsement on the policy at the time it was issued, was made "payable to Alexander Brown and Sons, as interest may appear." The policy upon which the suit was brought was for \$2,500. In March, 1891, a loss occurred, resulting in damages to the amount of \$18,900, from the perils insured against. The plaintiffs were then mortgagees of the property, holding a mortgage originally given for \$50,000, and upon which \$36,000 and upwards had been paid, when plaintiffs instituted proceedings for the sale of the property under a power of sale contained in their mortgage. On March 26th of that year a sale was made under this power, the property struck off to the plaintiffs, and the sale reported to the circuit court, but it was not finally confirmed until June 2d of the same year. Twenty-one policies of insurance had been issued upon the property, assuming risks aggregating \$56,000. On seventeen of the policies indorsements had been made by the insurers as follows: "This policy continued in the name of Alexander Brown and Sons, who have purchased the within property by foreclosure sale, subject to ratification by the court." The defendant pleaded—1. That by the policy it was provided that such policy should become void upon the passing or entry of a decree of foreclosure, or upon a sale under a deed of trust or levy under execution, or if the assured should be adjudged a bankrupt, or if any change takes place in the title or possession of the property, whether by sale, transfer, conveyance, legal process, or judicial decree, and that on March 26, 1891, the property was sold by plaintiffs under a deed of trust;

2. That such policy had become void prior to said 26th of March, because of a decree of foreclosure of the mortgaged premises passed and entered in the circuit court; 3. That such policy became void prior to said 26th of March, because before that date a change took place in the possession of said property; and 4. That the plaintiffs had been fully indemnified by and paid by other insurers for all loss sustained. To the pleas of the defendant the plaintiffs filed six replications. At the trial it appeared that the premises, at the time of effecting the insurance, and continuously thereafter until their destruction by fire, were occupied by a tenant of the owner who had exclusive possession thereof; that the share of loss payable by the defendant was \$775.64; that each policy stipulated that "in no case shall a claim be for a greater sum than the actual damage to or fair value of the property at the time of the fire, nor shall the insured be entitled to recover of this company any greater proportion of the loss or damage than the amount hereby assured bears to the whole sum insured on such property, whether such insurance is by specific or by general or floating policies, and without reference to the insolvency of other insurers." The defendant offered evidence tending to prove that the loss sustained by plaintiffs did not exceed \$17,300, as ascertained by arbitration between plaintiffs and nineteen of the insurance companies, which sum had been paid to plaintiffs by such companies. The plaintiffs, to rebut this evidence, proved that they were not satisfied with the amount as fixed by arbitration, and threatened suit on all the policies, and thereupon a compromise was effected whereby, in addition to the sum fixed by the arbitrators, the plaintiffs should be entitled to such amounts as, upon proper contribution, should be found due from the defendant and the other insurance companies, and that the claims for such amounts had been assigned to plaintiffs. By the first three prayers asked by the defendant the court was requested to rule, as a matter of law, that there had been an entry of a decree of foreclosure, a sale under a trust deed, and a change in possession, and, by the fourth prayer, a ruling was sought to the effect that if the loss amounted to \$17,300, and this sum had been paid by the other insurers, the plaintiffs could not recover though an assignment had been made to them by such indorsers. All the prayers were refused. Verdict and judgment for the plaintiffs.

Robert D. Morrison and Howard Munnikhuisen, and Nicholas P. Bond, for the appellant.

Stewart Brown and Arthur George Brown, for the appellees.

⁷⁰ BRYAN, J. The passing or entry of a decree of foreclosure is one of the causes which, according to the terms of the policy, would make it void; and it is maintained by the defendant that the proceedings for a sale under the mortgage were equivalent to the entry of such a decree within the meaning of the policy. A mortgage is, in law, a conditional sale. The mortgagor, in consideration of so much money, sells the property to the mortgagee, upon the condition, however, that the sale is to be void, provided by a given day the mortgagor repays the money with interest. If the mortgagor fails to repay the money, with interest, at the time stipulated, the mortgagee's title to the property becomes absolute at law, because the condition subsequent, which was to defeat it, has not been performed. But courts of equity give to the mortgagor what is called the equity of redemption; that is, they allow him to redeem his forfeited mortgage by repaying, notwithstanding the default, the sum mentioned therein. And the only way for the mortgagee to prevent this redemption is to file a bill in equity in which he calls upon the mortgagor to repay the money, or be forever foreclosed of his equity of redemption. The court, in due course, passed a decree appointing a day for the money to be paid, and declaring that if it is not paid at or before that time the mortgagor's right of redemption shall be forever taken away. Upon the failure to pay at the designated time the decree is made final and absolute. This is a decree of foreclosure, and it was the ordinary proceeding in behalf of mortgagees before the act of assembly, which authorized courts of equity to decree that the property should be sold. ⁷¹ The decree for foreclosure has disappeared from our practice, being entirely superseded by the more convenient decree for sale, which is, however, sometimes, though inaccurately, called a foreclosure decree. The proceeding in this case was not a decree of any kind, but an advertisement and sale under a power contained in a mortgage. To be sure, the sale under such a power would be as effective as a sale under a decree of a court of equity, and so would any other sale lawfully made. But if we could consider it as equivalent within the meaning of the policy to a decree, we could not disregard the difference between a decree

for a sale and a decree of foreclosure. A sale under a decree does not pass the title unless it is ratified and confirmed. The court is the vendor acting through its agent, the trustee, who has been appointed to make the sale. He reports to the court the offer of the bidder for the property; if the offer is accepted, the sale is ratified, and thereupon, and not sooner, the contract of sale becomes complete. Before ratification the transaction is merely an offer to purchase which has not been accepted. On the other hand, a decree of foreclosure *ipso facto* extinguishes the mortgagor's right of redemption, and vests the entire title in the mortgagee.

Another cause which would render the policy void is a sale under a deed of trust, or any change in the title or possession of the property. It was necessary that the sale made by the attorney named in the mortgage should be reported to a court of equity, and when it was reported, the same proceedings were required as if it had been made by a trustee under a decree: Code, art. 66, sec. 9, Public General Laws. We have seen that the sale was not a complete contract, and that, when reported, it was merely an offer to make a purchase which had not been accepted by the only authority competent to accept it; that is to say, the court. If we ⁷² read the whole of this clause containing the causes of forfeiture, it is evident that the purpose was to provide that the insurance should cease to be effective as soon as the title of the insured came to an end. It was not intended that he should have a right of recovery for the destruction of property which he did not own. But it could not have been the purpose to forfeit the policy while his ownership continued. The sale, under a deed of trust mentioned in the policy, means a consummated transaction, by which the interest of the insured was divested. The sale made by the attorney was finally ratified by the court after the fire had occurred. Before this ratification the proceeding was merely an unaccepted proposition for a purchase, and no change had taken place in the title. The property was occupied by a tenant of Hammond, the insured, and his occupancy was, in law, the possession of his landlord, and it continued to be vested in him until the change of title had been accomplished.

The fourth prayer presents a question of some interest. If all the insurers had bound themselves, by their policies, to pay the entire loss, and one or more of them had paid it, those so paying would have had a right of action against the others

for a ratable proportion of the amount paid by them ; because they would have paid a debt which was equally and concurrently due by the other insurers. As all were equally bound, all ought equally to contribute to the payment ; they were in a position similar to that of one surety who pays a debt for which other sureties are bound jointly with him. But in the different policies concerned in this case there is no concurrent liability. Each insurer, by the distinct terms of his contract, makes himself liable for a certain and definite fractional part of the loss to be calculated in the manner stipulated in the policies. In this case the defendant contracts to pay the proportion of the loss ⁷³ which the amount insured by it bears to the whole sum insured on the property in all the policies ; and it is stated in the evidence that the other policies had substantially the same stipulation. The contracts are entirely separate and independent of each other. Each insurer binds himself to pay his own proportion of the loss, without any reference to what may be paid by the others. If they pay more or less than they are bound to pay, or if they do not pay any thing, it in no manner concerns him. If, in this case, the other insurance companies had paid the whole loss, they would have had no right of contribution from the defendant ; and neither would such payment have discharged any portion of the defendant's liability to the insured. *Lucas v. Jefferson Ins. Co.*, 6 Cow. 635, was an action on a fire insurance policy, with a clause exactly similar to the one now in question. The court decided as follows : " Where there are several policies containing this clause they are all, and each, liable to pay the ratable portion mentioned in the clause, though it happen that some have paid more than their share, and even enough to cover the whole loss ; and this whether they had knowledge of all the policies at the time or not. There is no contribution between policies containing this clause. . . . When there are several policies on the same subject without this clause, it is double insurance ; they are all deemed but one policy, the insured can recover but one indemnity, and contribution prevails between the insurers." And it was considered perfectly well settled, in cases where policies did not contain this clause, and the insured recovered against one or more of them the amount of his loss, that he could not maintain his action against any of the other insurers. The reason was that he had recovered full indemnity from parties who stood in the position of co-insurers, and who had a right of

contribution against the makers of the other ⁷⁴ policies. The doctrine of Lucas' case was fully approved in *Whiting v. Independent Mut. Ins. Co.*, 15 Md. 297, where the same principles were applied to a different state of facts presented in a suit on a marine policy. It will be seen that it was an error in the fourth prayer to suppose that the payment of the whole loss would exonerate the defendant, inasmuch as it was not liable for contribution to the insurers who are alleged to have made the payment. We are now prepared to decide the question of evidence in the first exception. The assignments of their rights of contribution, made by the other insurance companies, were entirely futile, as they had no right of contribution against the defendant. The admission of the evidence introduced into the case an element of responsibility which could not be properly asserted against it. The plaintiffs' insurable interest was the debt secured by the mortgage. A portion of this debt had been paid before the suit was brought, as shown by the auditor's report which distributed the proceeds of the sale, and there still remained due more than \$13,000. The defendant was liable for its due proportion of this amount, and nothing more.

We have reserved the consideration of the demurrers until the last. The first, second, and third replications refer to documents which did not appear in any previous pleadings, and it is prayed that they may be considered as parts of these replications. It is the object of pleading to place on the record the facts which make up the plaintiff's cause of action and the defendant's ground of defense. If it is desired to show to the court the contents of a paper not already spread on the record, it may be done by exhibiting it, or by averring the legal effect of its contents; but it is totally inadmissible, by reference, to incorporate into a pleading the contents of a paper which is not produced. In determining the ⁷⁵ validity of the pleadings, it is not competent for the court to consider any thing which does not appear on the record. There are some redundancies and erroneous legal deductions in the first replication; but it substantially avers that there was no sale of the insured property within the meaning of the policy, as is averred also by the second and third replications. We must look to the substance of the pleadings, and not hold them insufficient because of the informalities which have been mentioned. There is no error in the fourth and fifth replications. The sixth replication is to the defendant's

fourth plea. This plea avers such insurance by other companies, and payment in full by them as would exempt the defendant from a suit by the plaintiffs, according to what we have said in a previous part of this opinion. There is no reference in the plea to the clause stipulating for a proportionate liability among the insurers, and it does not appear in the declaration. Without this clause we have seen those who did not pay would be liable for contribution to those who had paid the amount insured. We must take the plea as averring insurance by policies which did not contain this clause. The replication to the plea does not aver that the other insurers had paid more than their ratable portion of the loss; but it avers a compromise with them, and an acceptance of a smaller sum than the amount claimed by the plaintiffs, and an assignment to the plaintiffs of their claim against the defendant, in satisfaction of the larger sum demanded from them. They would have no right of contribution unless they had paid more than their ratable share of the loss. Moreover, the declaration in the cause is on a policy of insurance, and avers a direct liability to the plaintiffs on the contract contained in the policy, and this replication brings forward a new and distinct cause of action founded on several assignments of claims for contribution alleged to be due to other ⁷⁶ insurance companies. This is the error which is called a departure in pleading. The replication was bad on demurrer. It will be seen, however, that both plea and replication were dealing with supposed policies of insurance different in character from those which were afterwards offered in evidence; that is to say, with such as did not contain the stipulation for proportionate liability. The sixth replication, though erroneous, would have caused no injury to the defendant in itself, but it furnished the occasion for the admission of the incompetent evidence in the first exception.

Judgment reversed, and new trial ordered.

On a motion by the appellees for a rehearing, the following opinion was delivered by Judge Bryan:

BRYAN, J. We have carefully considered the opinion in this case, and find no reason to change it in any respect.

In *National Fire Ins. Co. v. Crane*, 16 Md. 261, 77 Am. Dec. 289, a policy of fire insurance had been issued to Gray and Brother which contained these words: "Loss, if any, payable to W. Crane & Co. as per application," and it was decided

by this court that by reason of these words the policy should be regarded as having been at its inception assigned to Crane & Co. The indorsement on the policy in this case made by the insurance company at the time it was issued was in these words: "Loss, if any, payable to Alexander Brown and Sons, as interest may appear." We therefore thought that it was to be considered as assigned to Brown and Sons, to protect their interest in the insured premises as it might be shown to exist. The effect of an assignment of a ⁷⁷ policy of insurance is well known; when the insurance company assents to it, a new contract arises between it and the assignee, having all the terms and conditions of the policy; the assignee being substituted in the place of the party originally insured, and becoming the owner of the policy. In the case of a fire insurance it is not questioned any where that the policy holder cannot recover unless he has an interest in the property insured, and that his recovery cannot be more than the amount of his loss. In *Lynch v. Dalzell*, Lord King is reported, in 2 Marshall on Insurance, 803, to have said: "These policies are not insurances of the specific things mentioned to be insured, nor do such insurances attach on the realty, or in any manner go with the same, as incident thereto, by any conveyance or assignment. But they are only special agreements with the persons insured, against such loss or damage as they may sustain. The party insured must have a property at the time of the loss, or he can sustain no loss, and consequently can be entitled to no satisfaction." His decree was affirmed by the house of lords in 4 Brown's Cases in Parliament, 431, and has always been considered as having finally settled the law. The mortgage debt due to Brown and Sons was the extent of their interest in the insured property, and they had a right to recover the unpaid portion of this debt, provided it did not exceed the sum insured. Their damage by the fire could not be more than the amount of the debt which remained due. If, the morning after the fire, their debtor had paid them in full no one could suppose that they had not been indemnified. In the record of this case the evidence showed that by the auditor's account the balance due the mortgagees was about \$13,000. When we spoke of this sum as the amount due we necessarily intended to be understood as speaking in reference exclusively to the evidence as stated in the record, and ⁷⁸ not as determining a question of

fact which would conclude either of the parties on a subsequent trial. It would have exceeded our jurisdiction to find facts on this bill of exceptions; but it was legitimate to assume, for the purposes of the discussion, the verity of the evidence therein stated, and make it the basis of our opinion on the questions of law which it presented. If in point of fact the auditor's report has not been ratified the conclusion which we founded on that hypothesis, of course, falls to the ground.

We consider it just in this case to regard Brown and Sons in the same position, by virtue of the assignment, as if they had originally insured their mortgage debt, and as, therefore, sole owners of the policy. We have examined the authorities cited in the argument and briefs of counsel; it is shown by them that in some jurisdictions the indorsement on the policy would not work an assignment of it. But in this state the law on this point has been settled by *National Fire Ins. Co. v. Crane*, 16 Md. 261, 77 Am. Dec. 289, and we consider our decision as a legitimate deduction from the principles of that case. We feel great respect for the opinions of the learned courts which we have examined on the questions here involved, but we cannot follow them where our own law prescribes a different rule of decision.

Motion overruled.

THE policy of insurance construed in the principal case is distinguishable from a policy containing a clause avoiding the insurance, "if within the knowledge of the assured foreclosure proceedings be commenced or notice given of the sale of any property covered by the policy by authority of any mortgage or trust deed." Under a policy containing these words it is not necessary that the sale should be confirmed or otherwise made final, nor, indeed, that any sale should be effected. It is sufficient that notice of the sale has been given or foreclosure proceedings otherwise commenced. Either event, *ipso facto*, terminates the indorser's liability: *Merchants' Ins. Co. v. Brown*, 77 Md. 79.

INSURANCE.—ALIENATION OF THE INSURED PROPERTY is not accomplished by a sale of the same which was voidable, and which was afterwards set aside: *Commercial etc. Assn. Co. v. Scammon*, 126 Ill. 355; 9 Am. St. Rep. 607.

INSURANCE.—CONTRIBUTION AND SUBROGATION BETWEEN INSURERS.—Insurers of several policies on the same property are sureties between themselves, and therefore any one or more who have paid the entire amount of a loss may recover from the others a proportionate contribution to the loss: *Millaudon v. Western Marine etc. Ins. Co.*, 9 La. 27; 29 Am. Dec. 433; *Wiggin v. Suffolk Ins. Co.*, 18 Pick. 145; 29 Am. Dec. 576; *Sloat v. Royal Ins. Co.*, 49 Pa. St. 14; 88 Am. Dec. 477; *Williamsburg etc. Ins. Co. v. Grinn*, 88 Ga. 65. There can be no contribution among co-insurers where two or more open policies of different dates have been issued by different insurers for the same

risk, subsequently attaching at the same instant under all the policies, there being a provision on the face of each policy against contribution with insurers of prior or subsequent date: *Deming v. Merchants' Cotton-press etc. Co.*, 90 Tenn. 306. See the extended note to *Alliance Assn. Co. v. Louisiana Ins. Co.*, 28 Am. Dec. 121.

INSURANCE—ASSIGNMENT OF POLICY—NEW CONTRACT.—The consent of the insurer to an assignment of a policy creates a new contract on his part, when there has been a prior forfeiture, only when the assignee is ignorant of such forfeiture: *Fire Assn. v. Flournoy*, 84 Tex. 632; 31 Am. St. Rep. 89, and note. See *Stout v. City Fire Ins. Co.*, 12 Iowa, 371; 79 Am. Dec. 539, and note; and especially the extended note to *New York etc. Ins. Co. v. Flack*, 56 Am. Dec. 747, where the questions relating to the assignment of policies of insurance are treated at length.

WEBB v. BALTIMORE AND EASTERN SHORE RY. CO.

[77 MARYLAND, 92.]

CORPORATIONS—SUBSCRIPTION TO STOCK.—A TENDER TO A SUBSCRIBER OF THE STOCK for which he has subscribed is not a condition precedent to the maintenance of an action to recover the amount of his subscription.

CORPORATIONS.—SUBSCRIPTION FOR STOCK IN A RAILWAY WHEN COMPLETED to a point designated becomes final upon the performance of the condition, and is then enforceable. No further subscription or other act is essential to convert or change the original subscription into an unconditional and absolute subscription.

CORPORATIONS—SUBSCRIPTION TO STOCK—STATUTE OF FRAUDS.—A subscription for stock in a corporation is not a contract for the sale of goods, wares, or merchandise, and is not within the statute of frauds.

John P. Poe, attorney general, and Sewell T. Milbourne, for the appellant.

Robert P. Graham and Harry L. D. Stanford, for the appellee.

⁹³ ALVEY, C. J. This action was brought to recover of the defendant for certain stock subscribed in the plaintiff company. The declaration contains several of the common *indebitatus* counts, but the fifth count is special, and it alleges that the defendant subscribed for, and agreed to take, twenty shares of the capital stock of the plaintiff company, and to pay one thousand dollars therefor, on the completion of ⁹⁴ the railroad of the company to the town of Vienna, Maryland; and that, although the said railroad has long since been completed to the said town of Vienna, and that the said subscription is due and demandable, the defendant has not paid the same, or any part thereof. By the pleas, the defendant

denied the legal existence of the contract alleged, or that he was in any manner bound thereby.

The questions presented on this appeal are simply as to the admissibility of evidence, and are presented by two bills of exception taken by the defendant.

At the trial it was admitted that the plaintiff was a corporation, duly organized and existing under the laws of the state; and that the plaintiff had constructed its railroad from Easton bay, in Talbot county, to the town of Vienna, in Dorchester county, before the 1st of January, 1891, and that, in the construction of its road, the plaintiff had expended large sums of money, and created a large indebtedness, still outstanding at the time of this suit brought, to wit, the twelfth day of August, 1891. It was also admitted, that, before this suit was brought, the defendant received from the secretary of the plaintiff a letter calling on him to pay the money alleged to be due on the stock, and further, that before the bringing of this suit, neither the plaintiff, nor any one in its behalf, ever offered or tendered the certificates for the stock subscribed for by the defendant. The plaintiff then offered in evidence a subscription book, purporting to be a subscription book for the stock of the plaintiff, and proved by an agent of the company, to whom the book had been intrusted, to procure subscriptions, that it was the subscription book of the plaintiff, and that the entry in that book, to which the name of the defendant was subscribed, was made and signed by the defendant. In that book there is this heading: "We, the undersigned, agree to subscribe to, and pay for, the ⁹⁵ number of shares of the capital stock of the Baltimore and Eastern Shore Railroad Company set opposite our names, provided the said road shall be built on the Vienna route; said shares of stock to be of the par value of fifty dollars, and the same to be paid for in installments of twenty per cent as any ten miles of road are completed." This heading had appended to it about sixty signatures; and then follows this entry:

20 { "I hereby agree to take twenty shares of the Baltimore and Eastern Shore Railroad stock when completed to Vienna.
"\$1,000.00. ALBERT WEBB."

To the offer of this subscription book, with the entry therein signed by the defendant, the latter objected, and, in

support of his objection, has assigned several grounds: 1. That there was no evidence of a tender of certificates of stock to the defendant, and that this suit could not be maintained without such tender; and that the subscription was invalid because the statutory installment was not paid; 2. That there was no contract of a present subscription for stock, but, at most, nothing more than a mere promise to subscribe when the road was completed to Vienna; 3. That if the entry signed by the defendant be treated as a present subscription to stock, the contract is within the provisions of the statute of frauds, 29 Car. II., chapter 3, section 17, and that it is fatally defective in omitting to name the vendor of the stock, and that there is no sufficient consideration for the defendant's undertaking shown on the face of the subscription paper. There is also a general objection taken to the admissibility of the subscription book in evidence. The objection to the admissibility of the evidence was overruled.

In the opinion of this court, none of the grounds assigned in support of the objection taken can be sustained.

⁹⁶ 1. There is clearly no valid ground for the objection that the certificates for the stock should have been tendered to the defendant, as a condition precedent to the right to maintain this action for the money due on the subscription. This would seem to be well settled: 1 Morawetz on Corporations, sec. 61, and cases there cited; *Scarlett v. Academy of Music*, 43 Md. 203. Nor is the objection well taken that the subscription is not binding upon the defendant, because it is not shown that an installment of five dollars in cash on each share of stock subscribed had been paid at the time of making the subscription, under section 163 of article 23 of the code. The omission of such payment does not invalidate the subscription. That construction of this provision of the statute has been settled by the decision of this court in the case of *Oler v. Baltimore etc. R. R. Co.*, 41 Md. 583. And with respect to the necessity for showing that the amount of the subscription had been called for by the directors of the company before suit brought, it was admitted that the defendant had received a letter before suit brought, purporting to be from the secretary of the plaintiff, calling upon him to pay the money due on the stock, as being then due, but that payment was refused. Whether that call or demand was made by the authority of the directors of the company was a question of fact for the jury upon all the evidence in the case.

2. The subscription in the form in which it was made was inchoate and conditional. It was such, however, as the company had a right to accept: *Taggart v. Western Maryland R. R. Co.*, 24 Md. 563; 89 Am. Dec. 760; *Philadelphia etc. R. R. Co. v. Hickman*, 28 Pa. St. 318. It was simply a continual offer by the defendant to become a stockholder after the condition specified had been performed by the company. The performance of the condition precedent on the part of the company was necessary ⁹⁷ to a valid acceptance of the offer thus made by the subscriber; and before this acceptance, by the performance of the condition precedent, the defendant did not, by virtue of such subscription, become a member of the company. His subscription was a mere offer, and unless withdrawn before the condition performed by the company, it became final and absolute immediately upon the performance of the condition; or, as said by this court in *Taggart v. Western Maryland R. R. Co.*, 24 Md. 563, 89 Am. Dec. 760, such conditional subscription, upon the performance of the condition, thus became ultimately an unconditional and absolute subscription. And that being the effect and operation of the subscription made by the defendant, it is quite clear that no other or further act of subscription was necessary, or contemplated by the parties, in order to convert the original conditional subscription into an unconditional and absolute subscription. The defendant appears to have declined the conditional terms embraced in the heading of the preceding subscriptions, which required the amount of the subscriptions to be paid in installments of twenty per cent as any ten miles of the road should be completed; and he preferred to make his subscription separate, and to make it depend upon the completion of the road to Vienna; and when the road was so made, which is admitted to have been done before this action was brought, the subscription of the defendant for the twenty shares of stock became absolute, and the price therefor thence became payable on demand of the directors of the company. This is the clear import of the subscription of the defendant. No particular form of subscription is made essential, and the present subscription is not of a formal character; yet there is enough in the paper, when read in connection with what precedes it in the same book, to show what was really intended by the parties to the contract.

⁹⁸ 3. The contention that this contract of subscription is within the statute of frauds, 29 Car. II., chapter 3, section 17,

is not maintainable, either upon reason or authority. A subscription for shares of stock, in an ordinary corporation, is not a contract for the sale of "goods, wares, and merchandise"; words which comprehend only corporeal movable property. Shares of stock are but choses in action, and are not within the statute; and this is the established construction of the statute by the English courts, as shown by the collection of cases by Mr. Benjamin in his admirable work on Sales, pages 91, 99; and the same construction has been adopted by decisions of high authority in this country: Brown on Statute of Frauds, sec. 298; Angell and Ames on Corporations, sec. 563; *Clark v. Burnham*, 2 Story, 15; though there are some decisions, especially of an earlier date, entitled to great respect, to the contrary. In the absence of a binding authority, such as an express decision of this court, we are not disposed to adopt and follow the decisions of the American courts holding that the statute does apply in such cases, being as they are in conflict with the English courts upon this subject. We think the English decisions furnish the better and more reasonable construction of the statute.

In the case of *Colvin v. Williams*, 3 Har. & J. 38, 5 Am. Dec. 417, the only case in this state supposed to give any support to the contention of the defendant, the question presented was quite different from that presented in this case. In that case there was a sale of bank stock by a broker, and the broker became the agent of both seller and buyer, and in whose name, as vendor, a memorandum of sale was made out and delivered to the defendant, who filled up the blank in the memorandum with the number of shares he desired, and accepted the same as purchaser of the number of shares sold. Upon this memorandum the court below held the plaintiff to be entitled to recover; ⁹⁹ and upon appeal this court held the court below right in its ruling, and affirmed the judgment. There was no opinion delivered; but it is stated at the conclusion of the case, whether by the authority of the court, or by the reporters of the case without such authority, does not appear, that it was said by the court "that the sale of bank stock is within the statute of frauds; and that the broker was the common agent of both the appellee and appellant." If such was the case, as we must take it to be, it is very clear that the declaration made at the conclusion of the case, "that the sale of bank stock was within the statute of frauds," was wholly unneces-

sary to the decision of the case, and was purely a *dictum*, if, in fact, it be assumed to have emanated from the court at all. The statute did not avail as a defense to the defendant, if it was, in fact, relied on as a defense, which does not appear to have been the case. There have been many cases since that decision in which such defense could have been taken, if the statute was applicable in such cases as this, but which passed without question as to the application of the statute.

Upon both exceptions, therefore, we are of opinion that the court below was correct in its rulings, and that the judgment appealed from should be affirmed.

Judgment affirmed.

CORPORATIONS—SUBSCRIPTION TO STOCK—STATUTE OF FRAUDS.—A contract to transfer shares of stock, when the same may be open to subscription upon the books of a corporation, is not within the provision of the statute of frauds: *Gudsdén v. Lance*, 1 McMull. Eq. 87; 37 Am. Dec. 548.

CORPORATIONS—ISSUANCE OF CERTIFICATE.—It is not necessary to a subscriber's ownership of stock in a corporation that a certificate therefor should have been issued to him: *California etc. Hotel Co. v. Callender*, 94 Cal. 120; 28 Am. St. Rep. 99, and note with the cases collected. See, also, the extended note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 830.

CORPORATIONS—CONDITIONAL SUBSCRIPTIONS TO STOCK.—Where subscribers agree to take stock in a railroad, upon condition that it shall be so located as to make a designated town a point, they become unconditional stockholders when the road is so located: *McMillan v. Maysville etc. R. R. Co.*, 15 B. Mon. 218; 61 Am. Dec. 181; *Spartanburg etc. R. R. Co. v. De Graffenreid*, 12 Rich. 675; 78 Am. Dec. 476. An agreement to take stock when a certain amount of it has been subscribed makes the subscriber absolutely and unconditionally liable when that specified amount has been duly taken: *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6; 16 Am. St. Rep. 293. See the note to *Marysville Electric Light etc. Co. v. Johnson*, 27 Am. St. Rep. 220, and the extended note to *Parker v. Thomas*, 81 Am. Dec. 398.

STATE v. WARREN.

[77 MARYLAND, 121.]

CRIMINAL LAW—INDICTMENT.—DUPLICITY IN A CRIMINAL PLEADING is the joinder of two or more distinct and separate offenses in one count.

CRIMINAL LAW—INDICTMENT.—THE STEALING AT THE SAME TIME of several articles belonging to several owners constitutes but one crime, and may, therefore, be charged in a single count of the same indictment without making it objectionable for duplicity.

Edward C. Peter and John Prentiss Pos, for the appellant.

Thomas Anderson and W. Veirs Bouie, Jr., for the appellee.

¹²¹ ROBINSON, J. The question raised in this case is one of some importance in criminal pleading. The indictment contains two counts, in each of which the prisoner is charged with stealing several sums of money at the same time belonging to several owners. And the question is ¹²² whether these counts are bad for duplicity. Now, by duplicity in criminal pleading is meant the joinder of two or more distinct and separate offenses in the same count. The object of all pleading, civil and criminal, is to present a single issue in regard to the same subject matter, and it would be against this fundamental rule to permit two or more distinct offenses to be joined in the same count. So the question really comes to this: Does the stealing of several articles of property at the same time, belonging to several owners, constitute one offense, or as many separate offenses as there are different owners of the property stolen? And, though the question is a narrow one, it is at the same time one in regard to which there is some conflict of opinion. Upon principle, however, it would seem clear that the stealing of several articles at the same time, whether belonging to the same person or to several persons, constituted but one offense. It is but one offense, because the act is one continuous act—the same transaction; and the gist of the offense being the felonious taking of the property, we do not see how the legal quality of the act is in any manner affected by the fact that the property stolen, instead of belonging to one person, is the several property of different persons. The offense is an offense against the public, and the prosecution is conducted, not in the name of the owner of the property, nor in his behalf, but in the name of the state, the primary object being to protect the public against such offenses by the punishment of the offender. And, although it is necessary to set out in the indictment the ownership of the property, this the law requires in order that the prisoner may be informed as to the precise nature of the offense charged against him; and further to enable him to plead a former conviction or acquittal, in bar of a subsequent prosecution for the same offense. So, it seems clear to us on principle that the taking of several articles ¹²³ of property under such circumstances constitutes but one felony. And this view is fully sustained, not only by the standard elementary books on criminal law, but by the best-considered cases. And though the stealing of property at different times, whether belonging to the same person or different persons,

constituted separate offenses, yet, says Mr. East: "If the property of several persons, lying together in one bundle or chest, or even in one house, be stolen together at one time the value of all may be put together so as to make it grand larceny, for it is one entire felony": 2 East P. C., sec. 136. The same rule is laid down in 2 Hale's Pleas of the Crown, 531, and 3 Chitty's Criminal Law, 9-24, and in 2 Russell on Crimes, sec. 127, and in fact by all the books, ancient and modern, in which the question has been considered. And in England there has been no departure, so far as we are advised from the rule. In *Regina v. Giddins*, 1 Car. & M. 634, where the indictment, which contained only one count, charged the four prisoners of assaulting and stealing from G. P. two shillings, and from H. P. one shilling and a hat, Tindal, C. J., said: "It is all one act, and one entire transaction. The two prosecutors were assaulted and robbed at one and the same time; and there was no interval of time between the assaulting and robbing of the one and the assaulting and robbing of the other. If there had been the felonies would have been distinct, but that is not so in the present case."

And in *Fulmer v. Commonwealth*, 97 Pa. St. 503, where the indictment, as in this case, contained two counts, in each of which the prisoner was charged with stealing several articles of property belonging to several owners, the taking being at the same time, and motion was made to quash the first count in the indictment, on the ground that it charged the prisoner with three separate felonies, the court, after a full review of the authorities, ¹²⁴ held that, although the property stolen belonged to distinct owners, it constituted but one offense, and the motion to quash was overruled. And, without quoting from the decisions, we may refer to *State v. Hennessey*, 23 Ohio St. 339; 13 Am. Rep. 253; and *State v. Merrill*, 44 N. H. 624, in which the question was fully considered, and decided in accordance with the views we have expressed.

The punishment prescribed by the statute for stealing goods of the value of five dollars is different, it is true, from that prescribed for stealing goods and chattels of less value. And the aggregate value of the several articles stolen may exceed five dollars, whereas the separate value of each article may be less than five dollars. But at common law there was a still greater difference in the degree of punishment between grand larceny; that is, the stealing of goods of the value of twelve pence, and petit larceny, which was the stealing of

goods under the value of twelve pence. And yet, it was always held that where the aggregate value of the several articles stolen amounted to twelve pence, whether belonging to the same person or to several persons, if taken at the same time, constituted grand larceny; it constituted grand larceny because it was one felony. And besides, it is always within the province of the jury to find the value of the property, and where the indictment charges it to be of the value of five dollars or more, and the proof shows it to be of less value, the jury ought so to find in accordance with the fact.

Judgment reversed, and case remanded.

INDICTMENT—DUPLICITY.—A defendant cannot be charged with two distinct offenses in the same indictment: *Bullock v. State*, 10 Ga. 47; 54 Am. Dec. 369; *State v. Harris*, 106 N. C. 682. An indictment is open to the charge of duplicity when two or more distinct offenses are charged in the same count: *Reagan v. State*, 28 Tex. App. 227; 19 Am. St. Rep. 833, and note; *State v. Lund*, 49 Kan. 209; note to *State v. Shores*, 13 Am. St. Rep. 886. See the extended note to *Ben v. State*, 58 Am. Dec. 240.

LARCENY—INDICTMENT.—STEALING SEVERAL DIFFERENT THINGS AT THE SAME TIME: See the extended note to *Ben v. State*, 58 Am. Dec. 241.

SOLLERS v. SOLLERS.

[77 MARYLAND, 148.]

FISH.—TO COMPLETE RIGHT OF PROPERTY, IN FISH, an actual appropriation or mancipation must be made. The possession must be complete, and if, when taken, they are voluntarily restored to their native element, so that they can only be regained in like manner to that in which they were originally taken, the right of property is lost.

FISH.—PROPERTY IN FISH CANNOT be created by constructing a fence across a public tidewater cove, and thus preventing their escape therefrom.

PRESCRIPTIVE TITLE TO LAND COVERED BY TIDEWATER cannot be acquired when the title is vested in the state, and it is incompetent to make any grant thereof.

TIDEWATER.—A STATUTE FOR THE PROTECTION OF OWNERS OF ARTIFICIAL PONDS situated on their land, or lands of which they are in legal possession in the ownership of such fish, or eggs, or spawn of fish as may be put therein for breeding, does not apply to tidewater coves, the title to which is vested in the state.

Daniel R. Magruder and John B. Gray, for the appellant.

John B. Bunting and James T. Briscoe, for the appellee.

149 PAGE, J. This case was probably instituted for the purpose of trying the title to certain land, covered by water,

¹⁵⁰ within the ebb and flow of the tide. The evidence contained in the record, however, is so meager, and evidently so imperfectly set out, that we are unable to ascertain with reasonable accuracy what the facts were upon which the instructions asked for by the parties, or granted by the court, were predicated. We are confined, however, to that which the record furnishes, and must render our decision in accordance with what there appears. By the first prayer of the plaintiff, the court was asked to instruct the jury, that if they found the defendant caught the fish of the plaintiff "while confined, and without the permission of the plaintiff," and appropriated them to his own use, their verdict must be for the plaintiff. The evidence to support this prayer was that the plaintiff "caught and confined" large quantities of fish in Terrapin cove. This cove, it is stated, "was an arm of Mearses' cove, which emptied into the Patuxent river through a channel made by John J. Sollers." It is uncertain from this statement whether the "channel" thus referred to was an entirely artificial way, or whether before it was made the waters of Mearses' cove had flowed through a natural outlet to the river. It must be inferred, however, that if Mearses' cove was an "arm" of the Patuxent there must have been a natural way through which the tide had always ebbed and flowed. The evidence further shows that Terrapin cove contained about one and a half or two acres of land, all of it covered by water, within the ebb and flow of the tide; that the deepest water in it was about eight feet, and that the fish taken by the defendant were confined therein by a wire fence "extending across its mouth thirty yards wide." Now, to complete the right of property in fish, an actual appropriation or "man-cupation" must be made. The possession must be complete; and if, when taken, they are voluntarily restored to their native element, so that they can only ¹⁵¹ be regained in like manner to that by which they were originally taken, the right of property is lost: Angell on Tide Waters, 137. This prayer does not require the jury to find, as one of the conditions of the plaintiff's recovery, that the plaintiff had title to the soil covered by the water of Terrapin cove; and we do not think that it can properly be maintained that by the construction of a fence across the mouth of the cove the plaintiff had so confined the fish as to retain the title to those he had caught and placed therein. By so restoring them to their native element, he relinquished the possession of them, and thereby

lost such right of property as he may have had in them. This prayer was therefore properly rejected.

The plaintiff's second prayer raises the question whether a continuous and adverse possession for twenty years prior to 1890, of land covered by water, within the ebb and flow of the tide, will confer such a title to the soil as will enable a party to maintain trespass against one who enters thereon, and catches fish without permission from the person claiming it. Since the passage of the act of 1862, chapter 129, there can be no difficulty on this point. That act, which is codified in the present code, article 54, section 46, provides that "no patent shall hereafter issue for land covered by navigable waters." "All the soil below high-water mark within the limits of the state, where the tide ebbs and flows, that is the subject of exclusive propriety and ownership belongs to the state, subject only to such lawful grants of such soil as may have been heretofore made": *Hess v. Muir*, 65 Md. 607; *Browne v. Kennedy*, 5 Har. & J. 203; 9 Am. Dec. 503.

Terrapin cove, therefore, being a tributary of Patuxent river, and within the ebb and flow of the tide, must be regarded as a public river or arm of the sea, the soil of which, under the charter granted to Lord Baltimore, became ¹⁵² vested in the state of Maryland; and so it remains, unless it be included in some grant by the state made prior to the passage of the act of 1862. The plaintiff in this case does not rely upon such a grant; his only claim is by adverse possession. But title by possession presumes a grant, and such a presumption cannot be entertained as against one incapable of granting: *Casey v. Inloes*, 1 Gill, 497; 39 Am. Dec. 658. No title, therefore, could be acquired by possession as against the state in the face of the statute, which expressly provides that no such grant shall be made, we therefore find no error in the rejection of this prayer. It is unnecessary to consider the fourth instruction asked for by the plaintiff. Inasmuch as it directed the jury, if they found the facts therein stated, to bring in their verdict for the defendant, the plaintiff was certainly not injured by its rejection.

Of the prayers granted by the court at the instance of the defendant, the second and third are apparently based upon the theory that Terrapin cove was an "artificial pond," constructed by the plaintiff under the statute law of Maryland, and that there could be no recovery unless the plaintiff had put certain "notices" in two or three newspapers in Calvert

county, or given such "notices" "by written handbills put up at public places near said pond." But said cove was an "arm of Mearses' cove," and therefore a tributary of Patuxent river, and not within the scope of any statute which has for its purpose the protection of fish in artificial ponds.

The statute supposed to be applicable to this case is not specifically mentioned in the record, nor in the brief of the appellee. It is described, however, in the brief of the appellant as being section 76 of article 39 of the code, and this being the only statute in any wise germane to this subject, we suppose it is the one upon which the theory of these two prayers was constructed. But this is a penal statute, enacted for the purpose of protecting ¹⁵³ owners of artificial ponds situated "on their own land, or lands of which they are in legal possession," in the ownership and control of such fish, or eggs, or spawn of fish, as may be put therein for breeding or cultivating fish, by making it a misdemeanor, punishable by fine, for any one to enter upon the premises for the purpose of fishing or to catch fish therefrom. This statute confers no rights, but simply protects rights which otherwise exist, by creating an offense and providing a punishment. It has no relevancy to this case. The granting of these prayers, therefore, was error. We do not deem it necessary to pass upon the defendant's first prayer, for the reason that the case must be remanded for a new trial, and in view of the fragmentary evidence with which we have been furnished, we have already expressed ourselves as fully as is proper.

Judgment reversed, and new trial awarded.

FISH—PROPERTY IN.—Fish, before they are taken, are the property of no one: *Treat v. Parsons*, 84 Me. 520; extended note to *Sterling v. Jackson*, 13 Am. St. Rep. 418.

FISHERIES.—The privilege of fishing in navigable rivers and arms of the sea is in the public, but an individual may, by grant or prescription, acquire an exclusive right of fishing therein: *Rogers v. Jones*, 1 Wend. 237; 19 Am. Dec. 493, and note. *Contra: Tillicum Fishing Co. v. Carter*, 61 Pa. St. 21; 100 Am. Dec. 597, and note. See the extended note to *Mather v. Chapman*, 16 Am. Rep. 51.

TWILLEY v. PERKINS.

[77 MARYLAND, 252.]

BICYCLES MAY BE EXCLUDED FROM PUBLIC HIGHWAYS by authority of the legislature, if, in fact, they are dangerous to the general traveling public.

BICYCLES, EXCLUDING FROM PUBLIC HIGHWAYS.—If county commissioners are given full power and authority to make reasonable rules and regulations for the use of a bridge by the public, this authorizes them to enact a by-law forbidding any person from riding a bicycle or tricycle over such bridge, and such a by-law will be presumed to be reasonable, and the burden of proving that it is not so rests on the party denying its validity.

FALSE IMPRISONMENT.—If, upon the arrest of an offender, the arresting officers require him to pay a designated sum or to submit to the penalty of going to jail forthwith, they are without legal justification, but if, on the other hand, the offender offers to pay, and does pay, the sum named as a penalty, rather than be taken before a proper judicial officer, such offender only performs his legal obligation incurred for an unjustifiable act, and has no cause of action against the arresting officers.

Thomas S. Hodson, for the appellant

Marion de K. Smith, for the appellees.

257 ALVEY, C. J. The plaintiff brought this action against the defendants for an assault and battery and false imprisonment. He alleges—1. That he was illegally arrested and detained; and 2. That he was, without legal or reasonable cause, assaulted by the defendants, and taken into custody by them, and, under threats of further detention and imprisonment in jail, he was required to pay the sum of two dollars and fifty cents in order to regain his liberty. The defendants pleaded not guilty.

The material facts of the case, as set forth in the record, are these:

The bridge at Chestertown over Chester river, the river dividing Kent and Queen Anne's counties, was originally constructed by the Chester Bridge Company, and was a toll-bridge. This bridge, by the authority of the legislature of the state, was purchased by the two counties, Kent and Queen Anne's, with the view, and for the purpose, of making it a free public bridge and thoroughfare, to be under the joint management and control **258** of the county commissioners of the two counties. This was authorized by the act of 1888, chapter 376. The act of 1890, chapter 85, is supplemental to the original act of 1888, and makes some changes in the manner of accomplishing the purchase, and as to how the bridge shall

be managed and controlled by the commissioners of the two counties, after the same should be turned over to them. From the time of the consummation of the purchase, it is declared by the third section of this latter act of 1890, "that thereafter said bridge shall be taken, held, and perpetuated as a free public bridge between said counties." And by the fifth section of the same act, it is provided that the commissioners of the two counties "shall have full power and authority to make reasonable rules and regulations for the use of said bridge by the public, and for the protection of said bridge and other property belonging thereto or therewith, and to enforce the observance thereof by imposing upon the party violating the same any reasonable fine, not exceeding ten dollars, for any violation thereof, which fines shall be collected as small debts are now collected, and shall be recovered in the name of said commissioners before any justice of the peace of either of said counties in which the party violating such rules and regulations shall be found, and on failure or refusal to pay, and inability to collect by legal process, the party so fined shall be committed to the county jail of the county for a period not exceeding ten days, in the same manner as commitments are made for fines imposed by the circuit courts of this state, on conviction for misdemeanor," etc.

In July, 1890, after the sale of the bridge had been effected to the counties, and the bridge turned over to their control, the commissioners of the two counties met and adopted rules and regulations for the use of the bridge by the public; but the only one of which rules that has been inserted in the record is this: 259 "No. 9. Persons will not be allowed to ride a bicycle, tricycle, or velocipede over the bridge." Notwithstanding this prohibition, the plaintiff, on the 18th of June, 1891, rode a bicycle over the bridge from the Kent county side to the Queen Anne's side, and on his return he was arrested and held in custody by the defendants, Perkins being the bridgekeeper, and Henly a constable of Kent county; and that the arrest was made without the issuance of any warrant. It is conceded that these parties, so acting, supposed that they were acting under and as authorized by the act of 1890, chapter 85; and that they used no more force or violence towards the plaintiff than was necessary. That these parties were charged with the duty of enforcing the rules made by the commissioners of the two counties; and that the defendants did compel the

plaintiff to pay the sum of two dollars and fifty cents as a penalty for the violation of said rule No. 9, under the alternative of going to jail forthwith if he refused to pay, which alternative the defendants were then and there ready to enforce; but, upon being paid the said sum, the defendants allowed the plaintiff to go at liberty.

It was further shown that the bridge was built of wood, and has wood railings, and is about one-third of a mile long from shore to shore; and that the depth of the water under the bridge is between eight and twenty feet, the greatest depth being in the channel of the river. It was also shown, in proof, that some horses, ordinarily gentle, are frightened at bicycles ridden by persons along the public highways, and that some horses never get accustomed to them; and that horses becoming frightened at bicycles ridden by persons on the bridge, would endanger the lives of persons driving such horses. The plaintiff offered proof tending to show that, as a general rule, horses, ordinarily gentle and well broken, do not become frightened at bicycles. That while the bridge was a toll-bridge persons were accustomed to ride over it on bicycles, and no accidents occurred.

²⁶⁰ The plaintiff objected to all the evidence offered by the defendants in justification, but the objection was overruled; and he then offered, upon the whole evidence, six prayers, the first of which was granted, and all the others were refused. And the defendants offered two prayers, both of which were granted; and by the second of which the court ruled that if the facts, as shown in proof, on the part of the defendants, were found to exist, "then the rule or by-law referred to in the evidence is a reasonable and proper rule or by-law, and the verdict must be for the defendants."

Upon the objection to the evidence, and the rulings upon the prayers, two questions are presented. The first and principal one is, whether the county commissioners, under the power given by the fifth section of the act of 1890, chapter 85, to make reasonable rules and regulations for the use of the bridge by the public, had the right to make any rule or by-law whereby all persons are denied the right to ride a bicycle, tricycle, or velocipede over the bridge? And if they had the power, then, secondly, whether the ninth rule or by-law, given in evidence, and the manner of enforcing it, as shown in this case, was a proper exercise of such power?

1. We do not suppose that it could be seriously disputed

that it is competent to the legislature, in the exercise of its police power and general right to regulate the use of the highways of the state, to restrict, and even forbid, the use of such vehicles as bicycles or tricycles on the highways, if they, in fact, be dangerous to the general traveling public. All individual rights are, more or less, subject to limitations and restrictions in their exercise, in the interest and for the protection of society generally; and if it be true that such vehicles as bicycles or tricycles are dangerous on the public highways, it would seem necessarily to follow that the legislature may reasonably restrict their use, ²⁶¹ rather than subject the public at large to the risk of danger in the enjoyment of a common right. And if such restriction may be made and enforced with respect to a common highway generally, *a fortiori* may it be made and enforced with respect to a bridge, such as that described in the evidence in this case. Indeed, it is a settled principle, that it is the obligation to the public of those intrusted with the duty of maintaining and governing the use of the public highways, to make and keep them as free of danger to the general public as can reasonably be done.

Assuming, then, that the power exists in the legislature of the state, the question is, whether the terms employed in delegating the power to the county commissioners be sufficient, the terms being that they "shall have full power and authority to make reasonable rules and regulations for the use of said bridge by the public"; that is to say, such full power and authority as the legislature could delegate to them for the purpose of regulating the use of the bridge, in such reasonable manner as would best subserve the interest and protection of the general traveling public. We are of opinion that the terms employed are sufficiently comprehensive to invest the commissioners with the power to make a by-law forbidding any person from riding a bicycle or tricycle over the bridge. And such rule or by-law, when made, must be taken as *prima facie* reasonable, and the *onus* of showing that it is unreasonable rests on the party denying its validity. It must be observed that the rule or by-law here attempted to be enforced does not deprive the party of the use of his property; it only forbids the riding of the bicycle or tricycle over the bridge. He can take or roll his bicycle or tricycle over the bridge, and then ride it at pleasure. He is only restrained from riding it over the bridge, because it may imperil the safety of others on the

bridge ²⁶² with equal rights of passage with himself. He has no right to insist upon the use of his property or vehicle on the common highway in a manner that may likely produce danger or injury to others who are lawfully exercising their rights in the ordinary use of their property. If, therefore, it be true, as supposed by the commissioners and found by the court in this case, that the riding of a bicycle or tricycle over the bridge would likely frighten horses and imperil the lives of passengers on the bridge it was not only reasonable, but the duty of the commissioners to forbid the riding of such vehicles over the bridge.

This is not a new question now for the first time presented.

In the case of *State v. Yopp*, 97 N. C. 477, 2 Am. St. Rep. 305, the question was as to the validity of a statute which forbade every person to use upon the road of a particular company a bicycle or tricycle, or other non-horse vehicle, without the express permission of the superintendent of said road," etc.; and it was held by the supreme court of that state that such regulation was clearly within the police power of the state, and was in all respects reasonable and valid. In that case it was shown, as stated by the court, that the use of these vehicles on the road materially interfered with the exercise of the rights and safety of others in the lawful use of their carriages and horses in passing over the road; and that, in repeated instances, horses became frightened at them, and carriages were thrown into the ditches along the side of the road. In that case it was contended as it has been contended in this, that confiding such power of exclusion (conceding the legislature to have the power) to the discretion of a subordinate officer was arbitrary and unjust; but the court said that the officer in control of the road was bound to exercise the discretion vested in him honestly, fairly, and reasonably, and for the sole ²⁶³ purpose of effectuating the intention of the statute and the protection of the public; and that there was nothing unreasonable in the exercise of his discretion in excluding the bicycle.

And so in New York, in regard to the public parks and squares, it has been held that an ordinance or by-law, made by the park commissioners, in pursuance of a general power of regulation under a statute, excluding from the parks and squares all bicycles and tricycles, was valid and reasonable. By the statute of that state of 1871, chapter 290, it is provided that the board of commissioners "shall have the full

and exclusive power to govern, manage, and direct the said several public parks, squares, and places; to pass ordinances for the regulation and government thereof, etc.; and all persons offending against such ordinances shall be deemed guilty of a misdemeanor, and be punished on conviction," etc. In *In the Matter of Wright*, 29 Hun, 357, 65 How. Pr. 119, the petitioners were arrested for violating the ordinance, which provided "that no bicycle or tricycle should be allowed in the Central or city parks"; and it was held that such ordinance was valid, and could not be held void as being unreasonable.

We are clearly of opinion, therefore, both upon reason and authority, that the county commissioners had power, under the statute, to make a rule, or by-law, forbidding all persons from riding bicycles or tricycles over the bridge.

2. With respect to the second question, we are inclined to think that the bills of exception do not present the case here as fully as it was presented to the court below. We must take the case, however, as the record presents it here. There is inserted in the record but one of the rules or by-laws made by the commissioners to regulate the use of the bridge, and that is the ninth, and it ²⁶⁴ makes no reference whatever to any penalty or fine prescribed by the commissioners for its violation. The statute requires the commissioners to exercise their discretion in fixing or imposing upon the party violating the rules or by-laws to be made any reasonable fine, not exceeding ten dollars, to be collected as small debts are collected, before a justice of the peace, etc. The power conferred is to make reasonable rules and regulations, etc., "and to enforce the observance thereof by imposing upon the party violating the same any reasonable fine, not exceeding ten dollars, for any violation thereof, which fines shall be collected as small debts are now collected, and shall be recovered in the name of the commissioners before any justice," etc. The statute manifestly intends that the commissioners of the two counties, as the governing body to whom the discretion is confided, shall exercise their discretion in imposing fines having reference to the nature and character of the offending act. A by-law, to be valid, must not only be reasonable but certain; indeed, it cannot be reasonable unless it be certain. Or, as Judge Cooley says: "A by-law, to be reasonable, should be

certain. If it affixes a penalty for its violation, it would seem that such penalty should be a fixed and certain sum, and not left to the discretion of the officer or court which is to impose it on conviction (citing cases); though a by-law imposing a penalty not exceeding a certain sum has been held not to be void for uncertainty," citing the case of *Mayor etc. v. Phelps*, 27 Ala. 55, overruling the previous case of *Mayor etc. v. Yuille*, 3 Ala. 137; 36 Am. Dec. 441; Cooley's Constitutional Limitations, 6th ed., 243. See, also, to the same effect, 1 Dillon on Municipal Corporations, 3d ed., secs. 337-339.

Here it appears from the exception taken that the plaintiff violated the rule or by-law, No. 9, and that he was arrested therefor, and that the defendants were ²⁶⁵ authorized to make the arrest. It was their duty at once to take the offender before a justice of the peace, to be dealt with according to the direction of the statute. But, instead of so doing, it appears they put the plaintiff to the alternative of paying two dollars and fifty cents, as a penalty, or of going to jail forthwith. This they had no right to do; and to the extent that they held him in custody on such alternative the imprisonment was false and without legal justification. But if, after the legal arrest, the plaintiff was willing and did pay the two dollars and fifty cents as the penalty prescribed by a by-law made by the commissioners, rather than be taken before a justice, he only performed his legal obligation incurred for his unjustifiable act, and he can have no cause of action against the defendants for the discharge of their duty.

It follows that the judgment must be reversed, and a new trial awarded.

Judgment reversed, and new trial awarded.

HIGHWAYS—RIGHT OF BICYCLES THEREON.—The owner of a bicycle, which, from its peculiar appearance, or the unusual manner of its use, frightens horses or otherwise imperils passengers over a road, has no right to use such vehicle on the road, and the legislature may regulate its use: *State v. Yopp*, 97 N. C. 477; 2 Am. St. Rep. 305. But see *Holland v. Burtch*, 120 Ind. 46; 16 Am. St. Rep. 307, and note; and *Mercer v. Corbin*, 117 Ind. 450; 10 Am. St. Rep. 76. In the latter case a bicycle was held to be a vehicle.

FALSE IMPRISONMENT.—An officer and complainant combining to extort money from a person in custody on a valid warrant for felony, by working on his fears, are liable to an action for false imprisonment: *Holley v. Mize*, 3 Wend. 350; 20 Am. Dec. 702.

McGRATH v. GEGNER.

[77 MARYLAND, 831.]

CONTRACT, TIME OF PAYMENT, WHEN AN ESSENTIAL PART OF.—Under a contract for the sale and purchase of oyster-shells made by the vendor during a designated season, in which the vendee agrees to pay on the first day of each and every successive week for the shells delivered during the previous week, such weekly payments constitute an essential part of the contract, and the failure to make them entitles the vendor to rescind the contract.

THE RESCISSION OF A CONTRACT IS JUSTIFIED by the refusal of the other contractor to perform one of its essential terms, as where, upon contracting to pay weekly for goods delivered to him under the contract, he neglects, after notice, to make such payments.

THE MEASURE OF DAMAGES FOR THE BREACH OF A CONTRACT TO SELL and deliver property is the difference between the contract price and the market price at the time the delivery is to be made.

A TENDER MADE IN A CHECK is good if objected to upon an entirely different and untenable ground.

DAMAGES ARE PRESUMED FROM THE BREACH OF A CONTRACT, and though no substantial loss is shown, the injured party is entitled to nominal damages.

At the trial the court instructed the jury that there was no evidence legally sufficient to maintain the defendant's right to rescind the contract on the twenty-eighth day of December, 1891, and that their verdict must therefore be for the plaintiff, and that the measure of damages is the difference between the contract price to be paid for the oyster-shells and the market price in Baltimore of similar shells at the date of their delivery to plaintiff according to the contract, and this date of delivery is to be taken as to as many of the shells as the jury may believe from the evidence the defendant could, with reasonable effort, put in piles upon the same ground as they had shells piled up during the previous season, and as to the balance of said shells to be the date when they were shucked or used. The court, though requested by the defendant, refused to instruct the jury that, in order to entitle plaintiff to recover, he must show that he had performed all his part of the contract, or had been prevented from performing it by the defendant; that the offer by the plaintiff of the check given in evidence was not a legal tender, and that the plaintiff is not entitled to rely thereon as a compliance by him with his duty to pay according to the contract, and that if the plaintiff did not pay the defendant in the manner and at the time stipulated in the contract, their verdict should be

for the defendant. A verdict and judgment having been given in favor of the plaintiff, defendant thereupon appealed.

Thomas Ireland Elliott, for the appellant.

Alfred S. Niles and Oscar Wolff, for the appellee.

335 ROBINSON, J. We cannot agree with the court below as to the construction of the contract in question, and for a breach of which this suit was brought. The plaintiff agreed to buy of the defendant all the oyster-shells made by him and H. F. Hemmingway, for the season beginning the 1st of September, 1891, and ending May 1, 1892. He agreed that boats should be kept at the docks of the defendant constantly, so as to keep the oyster-houses clear of shells, and on these boats the shells were to be delivered until the 20th of November, 1891. No shells were to be piled on the defendant's premises until about that time, and all shells thus piled were to be taken away by the plaintiff before the 15th of July, 1892. The plaintiff further agreed to pay on the first day of each and every successive week for the shells delivered during the previous week; that is to say, all shells delivered during the first week **336** in September were to be paid for on Monday of the following week, and so on for every week thereafter. Under this contract about seventy-five thousand bushels of shells were delivered between the 1st of September and the 26th of December, and on the twenty-eighth day of the latter month the defendant notified the plaintiff that the contract was at an end, and refused to deliver to him any more shells. This suit is brought to recover damages for an alleged breach of the contract, and the defense is that the plaintiff failed to make the weekly payments according to the terms of the contract; and failed also to keep boats at the defendant's docks, so as to clear the houses of the shells. As the defendant in his testimony admits that he did not declare the contract at an end, because of the failure of the plaintiff to keep boats at the defendant's docks, it is only necessary to consider whether his failure to make the weekly payment for the shells delivered justified the defendant in refusing to deliver to him any more shells. And this depends upon whether the weekly payments by the plaintiff are to be considered an essential part of the contract. And in considering this question it must be borne in mind, that the contract contemplated the sale of at least two hundred thousand bushels of shells, to be delivered daily during a period of eight months, from the 1st

of September to the 1st of May following; and further, that the contract provided in express terms for the payment of each week's delivery on the first day of the next week. We cannot suppose for a moment that the defendant meant to give an indefinite credit to the plaintiff, nor even a credit until all the shells were delivered or taken away. On the contrary, looking to the terms of the contract, it seems to us it was the intention of the parties that the weekly payments by the plaintiff should constitute an essential part of the contract. In other words, it was of the essence of the contract. In ³³⁷ *Withers v. Reynolds*, 2 Barn. & Adol. 882, where the defendant agreed to supply the plaintiff with straw to be delivered on plaintiff's premises, at the rate of three loads in a fortnight, during a specified time, and the plaintiff agreed to pay thirty shillings for each load so delivered, it was held that according to the true construction of the contract, each load was to be paid for on delivery, and that on the plaintiff's refusal to pay for the straw as delivered, the defendant was not bound to deliver any more. And in *Curtis v. Gibney*, 59 Md. 131, treating the contract as an agreement on the part of the defendant to consign ten thousand bushels of barley to the plaintiffs, the shipments to be made at different times, and payment to be made after receipt of each shipment, Bartol, C. J., said: "It is equally clear that upon his failure to remit to the appellant the proceeds in his hands arising from the sale of the barley, according to the terms of his contract with the appellant, the latter was not bound to make further consignments to him." If there be, however, any doubt as to the intention of the parties from the terms of the contract itself, their subsequent acts and declarations show beyond question that the weekly payments to be made by the plaintiff constituted an essential part of the contract now before us. So early as October 12th we find the weekly bill sent by the defendant to the plaintiff indorsed, "Please send money for these bills promptly." Again, on the bill of December 7th we find the following indorsement: "Terms, cash every Monday." And in his letter dated November 27th the defendant says: "Your contract reads that you are to pay us weekly, and you are no doubt aware of the fact that you have been violating that part of it." And in this letter he notifies the plaintiff that unless the weekly bills already due are paid at once he will refuse to allow him to take away any more shells. Again, in his letter

of the 7th of December, he ³³⁸ insists that the weekly bills shall be "paid promptly every week as per agreement." And finally, by letter of December 9th, he notifies the plaintiff that by reason of his failure to pay the bills weekly according to agreement, the contract between them is at an end. No objection whatever was made by the plaintiff to the defendant's construction of the contract, nor as to his right to annul it upon plaintiff's failure to make the weekly payments. On the contrary, upon the receipt of the letter of the 7th of December the plaintiff paid at once all the bills due at that time, and upon their payment the defendant continued to deliver the shells. On the 28th of December, however, having failed to pay the weekly bills for the 14th and 21st of December, the defendant sold the shells to another person at the same price. In the latter part of that day the plaintiff tendered to the defendant his check for one hundred and twelve dollars and forty-seven cents, being the amount due for bills of December 14th and 21st; but having sold the shells to another person before the tender was made, he refused to accept the same. It is clear, therefore, that the weekly payments were meant and understood by the parties to be an essential part of the contract, and the plaintiff having failed, time and again, to make these payments according to the terms of the contract, the defendant had the right to put an end to the contract, and to refuse to deliver any more shells under it to the plaintiff. And this being so, there was error in granting the plaintiff's second instruction. There is evidence, it is true, tending to show that the defendant had condoned or waived the default on the part of the plaintiff, and this question was properly submitted to the jury by the plaintiff's first instruction.

As to the rule in regard to the measure of damages, there cannot be, it seems to us, any difficulty in regard to this question. In an action on a contract of this kind, the damage is the actual loss sustained by the plaintiff ³³⁹ from the breach of the contract; and so far as money can do it, he is to be placed in the same situation as if the contract had been performed. And in estimating this loss the rule ordinarily is the difference between the contract price and the market price at the time agreed upon for the delivery of the goods and chattels sold. Now, in this case the defendant had delivered about seventy-five thousand bushels of shells; and if there was a breach of contract on his part in refusing to deliver any more shells, then the plaintiff was entitled to

recover, as damages, the difference between the contract price to be paid for the balance of the shells and the market price at the time, or times, when the shells were to be delivered: *Pinckney v. Dambmann*, 72 Md. 184; Benjamin on Sales, sec. 882.

And the court, in granting the plaintiff's fifth prayer, as we understand it, so instructed the jury. At the same time we deem it proper to say that the prayer is encumbered with a good deal of unnecessary verbiage, a matter always to be avoided in the trial of all causes.

As to the several instructions offered by the defendant, these were all properly rejected. The first and third were properly rejected because, if it be assumed that there had been a breach of the contract by the plaintiff himself, these instructions do not submit to the jury to find whether the breach or breaches by him had been condoned or waived by the defendant.

The second instruction presents the question whether the tender made by the plaintiff on the 28th of December of his check for one hundred and twelve dollars and forty-seven cents, in payment of the weekly bills for the 14th and 21st of December, constituted a lawful tender. He had been in the habit of making payment for the weekly deliveries by checks, and when the check in question was tendered to the defendant he refused to accept it, not because the tender of payment was made by check instead of lawful money, but because ³⁴⁰ he had declared the contract to be at an end, and had, in fact, sold the balance of the shells to be made by him during the oyster season to another person. And, such being the case, we take it to be well settled that where a tender is made, whether it be by ordinary bank notes, or by a check on a bank, and the tender is refused, not because of the character or quality of the tender itself, but on other grounds, the tender thus made and refused will be considered in law a lawful tender. And for the reason that all objection to the character of the tender will be considered as having been waived; and for the further reason that, if objection had been made on the ground that the tender was not made in lawful money, the party would have had the opportunity of getting the money and of making a good and valid tender: *Young v. Harris*, 2 Crompt. & J. 14.

The defendant's fourth prayer was not pressed in argument. If there was a breach of the contract in refusing to

deliver the shells to the plaintiff, the latter was under no obligation to go into the market and purchase other shells, even though he might have purchased them at the same or less than the contract price. If there was no difference, in fact, between the contract price and the market price at the time the shells were to be delivered, the plaintiff, it is true, sustained no actual loss from the breach of the contract. But, at the same time, even though he failed to prove any *bona fide* substantial loss or damage, he was still entitled to nominal damages. Whenever a contract is broken the law presumes that some damage has been sustained, and if the plaintiff should fail to prove any actual loss or injury he is still entitled to a verdict for nominal damages: *Feize v. Thompson*, 1 Taunt. 121; *Embrey v. Owen*, 6 Ex. 353.

Judgment reversed, and new trial awarded.

CONTRACTS.—WHAT STIPULATIONS SHOW TIME TO BE OF THE ESSENCE OF A CONTRACT: See the extended note to *Jones v. Robbins*, 50 Am. Dec. 597. Time is of the essence of a contract when it appears from the contract the parties so intended it: *Wells v. Smith*, 7 Paige, 22; 31 Am. Dec. 274; *Miller v. Coz*, 96 Cal. 339.

CONTRACTS.—RESCISSION.—Refusal to fulfill a contract must be absolute to be tantamount to an assent to its dissolution, and to authorize the other party to rescind it: *Fay v. Oliver*, 20 Vt. 118; 49 Am. Dec. 764, and note. Rescission of a contract does not follow as a consequence of its nonperformance by either party: *Duncan v. Jeter*, 5 Ala. 604; 39 Am. Dec. 342. A party may rescind a contract after a partial execution thereof, where the other party refuses to complete it, if the latter may be put in the same position as before: *Luey v. Bundy*, 9 N. H. 298; 32 Am. Dec. 359. But see *Stevens v. Cushing*, 1 N. H. 17; 8 Am. Dec. 27. As a general rule a contract cannot be rescinded by one party to it for the nonperformance of the other party, unless the former is in a position to demand specific performance: *Hale v. Cravener*, 128 Ill. 409. See, further, the extended notes to *Arnold v. Hagerman*, 14 Am. St. Rep. 724, and *Hough v. Hunt*, 15 Am. Dec. 572.

DAMAGES FOR BREACH OF CONTRACT TO SELL PERSONAL PROPERTY when the purchase price has not been paid is the difference between the contract price and the market price at the time and place of the promised delivery: *Austrian v. Springer*, 94 Mich. 343; 34 Am. St. Rep. 350; *Trigg v. Clay*, 83 Va. 330; 29 Am. St. Rep. 723, and extended note.

LUCKE v. CLOTHING CUTTERS AND TRIMMERS' ASSEMBLY.

[77 MARYLAND, 396.]

LABOR UNIONS—LIABILITY OF.—A NOTICE FROM A LABOR UNION to a firm of clothiers that if the non-union man in their employ is any longer retained, all labor organizations in the city will be notified that the house is a non-union one, and asking that the matter be given due consideration, must contemplate that such non-union man will be discharged from his employment, and therefor renders the union answerable for damages resulting from his discharge by his employers as a consequence of such notice.

A LABOR UNION PROCURING THE DISCHARGE OF A PERSON from his employment because he is a non-union man acts wrongfully, and is liable for the consequent injury to him.

LABOR AND TRADES UNIONS, POWERS OF.—A statute authorizing the formation of labor unions "to promote the well-being of their every-day life, and for mutual assistance in securing the most favorable conditions for the labor of their members and as beneficial societies" does not authorize the promotion of such objects by making war upon non-union laboring men, or by illegal interference with their rights and privileges.

PRESUMPTION OF INTENTION.—The courts are bound to impute to men that intention which their acts and conduct disclose, and if a trade or labor union informs employers of men that in case a non-union man remains in their employment, all the labor organizations in the city will be informed that their business is a non-union one, the courts are bound to infer an intention to procure the discharge of such non-union man, and the consequent interference with his right to labor for the support of himself and family.

CONTRACT, INTERFERENCE OF THIRD PERSON IN.—If a contract would have been performed but for the false and fraudulent representations of a third person, an action will lie against him although the contract could not have been enforced by action.

INTERFERENCE WITH THE FREE EXERCISE OF ANOTHER'S TRADE OR OCCUPATION or means of livelihood by fraud or force, such as preventing people, by threats or intimidation, from trading with or continuing him in their employment, is an actionable wrong.

CONTRACT—PLEADING.—If ONE IS ENGAGED TO WORK FOR ANOTHER, and would have been retained in that employment as long as his work was satisfactory but for the unlawful interference of a third person by which his discharge is secured, he may sustain an action for the resulting damages. In such action, however, he should allege the true facts concerning his contract of employment, and cannot recover upon an allegation of a contract for a long or specific time. He may be permitted to amend his declaration in accordance with the facts, and thereupon to maintain his action.

William L. Marbury and William L. Hodge, for the appellant.

William Pinkney Whyte, for the appellee.

397 ROBERTS, J. This is an action brought by the appellant to recover damages for the wrongful and malicious inter-

ference of the appellee, by which he was discharged from his employment ³⁹⁸ in the New York Clothing House, and prevented the free exercise of his trade and occupation, and thereby deprived of his means of livelihood. It appears from the testimony produced on the part of the appellant in the court below, that the trade of the appellant was that of a "customs cutter," that is, one who took the measure of customers desiring to have clothing made to order, cut the material according to measurement, and fit the same on the customer. This had been his trade for twenty years, and he was a thoroughly skilled man in his trade, and had since the year 1860 been a citizen of Baltimore city. In August, 1891, he was employed by Rosenfeld Brothers (trading as the New York Clothing House) as a customs cutter, at a salary of thirty dollars a week. At the time of his employment he was assured by Rosenfeld Brothers that in the event of his work proving satisfactory to them, they would give him permanent employment. Subsequently, his employers informed him that they were entirely satisfied with him, and that they would retain him in their service as long as he might choose to remain. Shortly thereafter Isaac Rosenfeld, one of the members of the firm of Rosenfeld Brothers, called his attention to the fact that certain members of the appellee corporation were complaining of his employment, on the ground that he was a non-union man, that is, he was not a member of the appellee, which is a labor union, and a branch of the general organization known as the K. of L., or Knights of Labor; thereupon the appellant expressed his willingness to become a member of the appellee, and requested a witness, named Franz, who testified at the trial below, and who was a member of the appellee in good standing, to present his application, as the appellee being a secret organization, he could not obtain access to its meetings, for the purpose of presenting the application in person. The appellant ³⁹⁹ had been informed by several members of the appellee that the manner in which he had made his application was the only way in which it could be done. Franz subsequently informed the appellant that he had made application to the appellee for his admission, but the appellee could not act on it that night, which was in the early part of December, 1891, owing to the fact that they had too many union men out of employment, but that they would act on it in February; that in February, about a week before the appellant was discharged,

a committee of certain members of the appellee called at the New York Clothing House to inquire about the matter of the appellant's employment while he was a non-union man; one of the committee was Michael, the master workman of the appellee, whose position in the organization was equal to that of president; the committee spoke to the appellant concerning his not being a member of the appellee, when he stated then that he had made application for membership through one of their members, and expressed his willingness to join their organization; they then informed him that every thing would be satisfactory, and said that they would see that every thing would be properly attended to, and went away leaving the appellant under that impression. The appellant heard nothing further until the following Saturday, when one of the firm of Rosenfeld Brothers exhibited to him a notice which the firm had received from the appellee, as follows:

"CLOTHING CUTTERS AND TRIMMERS'

"L. A. 7507, K. of L.

"BALTIMORE, February 16, 1892.

"*Messrs. Rosenfeld Bros.,*

"GENTLEMEN: Clothing Cutters and Trimmers' L. A. 7507, K. of L., do herewith desire to inform you that in case the non-union man whom you have in your employ ⁴⁰⁰ is any longer retained we will be compelled to notify all labor organizations of the city that your house is a non-union one. Trusting you may give this matter due consideration,

"We are respectfully yours,

"Clothing Cutters and Trimmers'

"L. A. 7507, K. of L.,

"JNO. G. NAGENGAST,

"Secretary."

That upon receiving said notice the said firm immediately notified the appellant that he would have to go, and did, in fact, discharge him from their employ, at the same time notifying the appellee of their action by sending them the following letter:

"OFFICE OF NEW YORK CLOTHING HOUSE,

"102 and 104 East Baltimore Street,

"Opposite Light Street.

"BALTIMORE, February 18, 1892.

"*John G. Nagengast, Esq., No. 31 S. Washington, city,*

"DEAR SIR: Your letter received, and your request will be

granted; the gentleman referred to will be discharged Saturday night.

Yours respectfully,

"ROSENFELD BROS.,

"Cutters and Trimmers.

J. W. Frey."

The appellant further proved that, at the time of his discharge, his employers were entirely satisfied with his work, and anxious to retain his services; that, at the suggestion of his employers, he went to see Mr. Michael, the master workman, and asked him why he had been treated in the way he had; Michael responded that he knew it was a wrong being done him, but that the appellee had passed a resolution not to accept any more members, ⁴⁰¹ and that was the only ground of their action, and they did so because there were so many union men out of employment; that he, Michael, had made an effort to procure a repeal of the resolution, but had been unable to do it. Michael informed the appellant that there was no objection to his becoming a member of the appellee. The appellant further proved that he was never informed by any one that it was necessary for him to appear before an examining board, or to take any further steps, or to do any thing further than he had done, in order that he might become a member of the appellee. Appellant was a married man, and after his discharge he made every effort he could to obtain work; but, after the action taken by the appellee, it was impossible for him to secure a position with any of the clothing houses, and at the time of his discharge he was unable to procure service with the merchant tailors, owing to its being their dull season, and he did not, until the following April, obtain employment, which was from a merchant tailor, at five dollars a week less than he received from Rosenfeld Brothers; that he had been employed by Rosenfeld Brothers by the week, but after he had been there awhile he was told that his employment was permanent, but that they had the right to discharge him at the end of any week. It was in proof by one of the Rosenfeld Brothers that the appellant was a first-class "customs cutter," that he "filled the bill exactly," and that their firm were entirely satisfied with him, and would not have discharged him but for the objection of the appellee; that they discharged him on account of the letter received from appellee, dated February 16th, and by letter dated February 18th they notified the appellee of the receipt of its letter, and stated

that "its request would be granted, and the gentleman referred to will be discharged Saturday night"; to which there was no reply by the appellee. Witness further proved that, in ⁴⁰² his opinion, as a consequence of the failure of his firm to discharge the appellant, their patronage would have fallen off to the extent of organized labor, and that all the union cutters would have been ordered out, and that it would have gone still further than that—that not only the people who cut the material, but those that sewed on the work, would have been stopped from cutting or sewing for us, and if the union men in our employ at the time the appellant was discharged had been called out, and left, the effect would have been to cause us great loss, as we had on hand at that time a number of contracts.

The appellee then offered evidence tending to prove that the by-laws of the organization required application for membership to be made in a certain manner, with which the appellant had not complied; that the local law of the appellee, and the general law of the Order of the Knights of Labor, prohibited the calling out of their members, because of the employment of non-union men. It was also testified, on the part of the appellee, that, in talking to Mr. Rosenfeld, no one had used fraud or intimidation in regard to calling out members if he did not make the New York Clothing House a union house. The appellee then had a membership of five hundred.

In the month of January, 1891, the firm of Rosenfeld Brothers had promised the appellee that they would employ none but union men, provided the appellee would include the New York Clothing House among the names of those houses which the appellee was publishing monthly in the Critic, a paper devoted to the interest of labor organizations. The publication of said names was as follows:

"THE CRITIC.

"Saturday, February 14th, 1891.

"Issued Monthly, February, 1891.

"To Organized Labor:

⁴⁰³ "All members of labor organizations are most respectfully urged to buy or have their clothes made by the clothiers named in this advertisement, and to use their influence among their friends to follow their example. The prices of these firms will be found as low as non-union firms, and the work will be more reliable and satisfactory.

"Clothing Cutters and Trimmers' Assembly 7507, K. of L., takes pleasure in recommending to members of labor organizations, and all friends of labor generally, the following named firms, whose work is cut and trimmed by members of L. A. 7507, K. of L." Then follows the names of nine houses of which the New York Clothing House was one. The statement is formally signed by "Frank Armiger, Master Workman, and J. G. Nagengast, Recording Secretary."

Appellee further proved that the effect of the refusal of the New York Clothing House to discharge the appellant upon receiving the appellee's letter of February 16, 1892, would have been to cause the withdrawal, by the appellee, of said house's name from the list of those advertised in the Critic.

These are the facts, a full statement of which is necessary to a proper understanding of the merits of the controversy, and the disposition of the same. The case was taken from the consideration of the jury by the prayers granted at the instance of the appellee, on the ground that there was no evidence in the clause legally sufficient to entitle the appellant to recover in this action, which, in legal effect, is nothing more than a demurrer to the evidence. We are therefore to inquire whether the court below committed error in granting the instructions asked for, by which the case was taken from the jury.

The appellant's engagement with Rosenfeld Brothers as a "customs cutter" commenced in the month of ⁴⁰⁴ August, 1891, and continued to the month of February, 1892, and was to continue as long as his work proved satisfactory. His work gave entire satisfaction to his employers, who, however, retained the right to discharge him at the end of any week; but a member of the firm testified that they would not have discharged him but for the objection of the appellee. The appellee on the sixteenth day of February, 1892, sent Rosenfeld Brothers a written notice, informing them, "that in case the non-union man whom they had in their employ was any longer retained it would be compelled to notify all labor organizations of the city that their house was a non-union one." How many similar organizations there were in the city the record does not disclose, but the membership of the appellee is five hundred. This notice the Rosenfeld Brothers construed to mean, that if they retained the appellant in their employ they would lose the patronage of the labor organizations, and that the union labor which they then

employed would be ordered out, or they would have to quit work, the effect of which, as testified by Mr. Rosenfeld, would have been to cause his firm great loss, in consequence of their having a number of contracts on hand at that time.

There are several inquiries which arise out of the facts just stated:

1. Had the appellee justifiable cause in pursuing the course which it did in threatening said firm, that if they retained the appellant any longer in their employ it would be compelled to notify all labor organizations of the city that their house was a "non-union house"?

2. Was the conduct of the appellee, in the course pursued by it towards the appellant, wrongful or malicious?

3. Had Rosenfeld Brothers reasonable ground to anticipate loss or injury to themselves in consequence of the action of the appellee?

⁴⁰⁵ The first and second propositions can be considered together, as they are somewhat reciprocal in the relation they bear to each other. It is contended on the part of the appellee that it did not, by sending the notice of February 16th to Rosenfeld Brothers, contemplate any such course as that which has been attributed to it, and that the local law of the appellee and the general law of the Order of the Knights of Labor prohibited the calling out of their members because of the employment of non-union men. If this be so, how are we to interpret the meaning of the written notice? What purpose did the appellee have in sending it, and what design was, through its agency, sought to be accomplished. This was no idle play in which they were involved. It related to the most serious right affecting a laboring man's life, which was the privilege of seeking remunerative employment, and thereby gaining an honest livelihood. Is it not unquestionably true that, but for the interference of the appellee, the appellant would not have been discharged? It is not necessary that such interference should have been malicious in its character. If it be wrongful it is equally to be condemned, and just as much in violation of legal right. In this case we think the interference of the appellee was, in law, malicious, and unquestionably wrongful. The appellant was a man of family, a good workman, engaged in a lawful pursuit, performing his duties in an entirely satisfactory manner, without objection in any respect, and willing and desirous of becoming a member of the appellee, if an opportunity had been

afforded him. He was not able to obtain membership with the appellee, nor was he permitted to continue his work with his employers, who would gladly have retained him in their service, if they could have done so without loss or embarrassment to themselves. Can it, then, be seriously questioned, that from the evidence in this cause the appellee intended, or expected, any other or different ⁴⁰⁶ result from the sending of the written notice than that which followed its reception by Rosenfeld Brothers? We are compelled to say that the notice had some meaning and purpose, and if not that which we have suggested, what was it?

The testimony in this cause assigns no other motive, and there is not the slightest intimation from any source that there is any. If, therefore, the appellee sought to bring about the discharge of the appellant under the circumstances detailed in the evidence, if not malicious, it was certainly wrongful, and by so doing it has invaded the legal rights of the appellant, for which an action properly lies. It is further contended by the appellee that it only meant by the notice sent Rosenfeld Brothers to say, that unless they discharged the appellant it would withdraw the name of the New York Clothing House from the list of houses published in the Critic, which list had annexed to it a statement recommending said houses to the patronage of organized labor. Yet even this view of the letter contemplated the discharge of the appellant, and necessarily concedes that the sole purpose of the letter was to accomplish the appellant's discharge. In no view of the facts of this case have we been able to ascertain where the appellee derived its right to obtain, by the means adopted, the discharge of the appellant from his position with Rosenfeld Brothers. The provisions of law authorizing the creation of the appellee corporation provides for the formation of trade unions "to promote the well being of their every-day life, and for mutual assistance in securing the most favorable conditions for the labor of their members, and as beneficial societies": Code, art 23, sec. 37.

But when the state granted its generous sanction to the formation of corporations of the character of the appellee, it certainly did not mean that such promotion was to be secured by making war upon the non-union ⁴⁰⁷ laboring men, or by any illegal interference with his rights and privileges. The powers with which this class of corporations are clothed are of a peculiar character, and should be used with prudence,

moderation, and wisdom, so that labor, in its organized form, shall not become an instrument of wrong and injustice to those who, in the same avenue of life, and sometimes under less favored circumstances, are striving to provide the means by which they can maintain themselves and their families. It is essential to good government and the peace of society that correct legal principles be applied in the consideration of all questions; for it is undeniably true that wrong principles cannot, and never do, produce salutary remedies.

The third proposition can be disposed of without extended comment. We think Mr. Rosenfeld in his testimony has fairly and intelligently answered this inquiry. His long experience in business, and accurate knowledge of the various methods in vogue for the employment of labor in clothing houses, eminently qualify him to say whether his firm had just cause to apprehend the consequences of a refusal, under the circumstances, to discharge the appellant.

Viewed by the light of all the circumstances surrounding the case, we are compelled to say that there was reasonable cause to apprehend the result stated by Mr. Rosenfeld in his testimony.

"Courts are bound to look at things just as they are, to pass on facts just as they are developed, to treat the conduct of men just as it is, and to impute to them that intention which their acts and their conduct disclose was their intention": *United States v. Kane*, 23 Fed. Rep. 750.

Some criticism was indulged in in the argument of counsel in this court to the effect that a recovery could not be had in this cause, as the appellant had only ⁴⁰⁸ declared on a supposed violation of a contract, when in point of fact there had been no contract violated. We concur in this view, and are clearly of opinion that the declaration sets out a cause of action which the proof fails to sustain. The question of a contract *vel non* enters into the consideration of this case, but, upon proper averment in the declaration, ought to play but small part in its determination. "Where a contract would have been fulfilled but for the false and fraudulent representations of a third person, an action will lie against such person, although the contract could not have been enforced by action": *Benton v. Pratt*, 2 Wend. 385; 20 Am. Dec. 623. In the case of the *Johnston Harvester Co. v. Meinhardt*, 9 Abb. N. C. 396, 397, the court said: "A distinction has been sought to be made between the cases where there has been

an unexpired time contract and cases where the services were by the day or by the piece, but I do not think such distinction rests upon any sound reason. . . . In such case the injury to the property and business of the employer would not consist so much in breaking the contract which existed, as in the loss of profits derived from the work of the laborer if he continued in the employment, and the probability or certainty of such loss would be in each case a question of fact," and, of course, for the jury.

Mr. Addison, in his work on Torts, folios 9-14, thus summarizes the law: "Interference by fraud or force with the free exercise of another's trade or occupation, or means of livelihood, is a tort—such as preventing people, by the use of threats or intimidation, from trading with the plaintiff's vessel in a foreign port, or dealing at the plaintiff's shop, or sending their children to the plaintiff's school, or placing obstructions or impediments in the way of free access to the plaintiff's place of business. . . . Where a violent or malicious act is done to a man's occupation, profession, or way of getting ⁴⁰⁹ a livelihood, there an action lies in all case." Considerable comment was made at the hearing in this court of the analogy supposed to exist between the case made by the record in this cause and the case of *Lumley v. Gye*, 2 El. & B. 216, but the cases widely differ in important facts, and there is but small analogy in the principles of law properly applicable in each case. The principles of law which are entitled to recognition in this case are too well settled and determined in a multitude of cases to require numerous citations for their support. The case of *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367, is strikingly like the case now under consideration. The court in that case says: "From the authorities referred to, and upon principle, it is apparent that neither the fact that the term of service interrupted is not for a fixed period, nor the fact that there is not a right of action against the person who is induced or influenced to terminate the service or to refuse to perform his agreement, is of itself not a bar to an action against the third person maliciously and wantonly procuring the termination of, or a refusal to perform, the agreement. It is the legal right of the party to such agreement to terminate or refuse to perform it, and in doing so he violates no right of the other party to it; but so long as the former is willing and ready to perform it, it is not the legal right, but is a wrong on the part

of a third party maliciously and wantonly to procure the former to terminate or refuse to perform it. Such wanton and malicious interference, for the mere purpose of injuring another, is not the exercise of a legal right. Such other person who is in employment by which he is earning a living, or otherwise enjoying the fruits and advantages of his industry, or enterprise, or skill, has a right to pursue such employment undisturbed by mere malicious or wanton interference or annoyance. Every one has a perfect right to protect or advance his business, ⁴¹⁰ if, in so doing, he infringes no superior legal right of another."

In *Bowen v. Hall*, L. R. 6 Q. B. D. 338, it was said by Brett, J. (Lord Selborne concurring), that "merely to persuade a person to break his contract may not be wrongful in law or fact. . . . But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and fact a wrong act, and therefore a wrongful act, and therefore an actionable act, if injury follows from it."

The appellant, by the action of the appellee, lost his place in the month of February, and although persistently in quest of a position, he did not succeed in obtaining work until the following April, when he secured employment with a merchant tailor, at five dollars less per week than he was receiving when he was discharged. It would be strange, indeed, if the law, under such a state of facts as this record exhibits, provided no remedy. In *Winsmore v. Greenbank*, Willes, 581, it is said: "A special action in the case was introduced for the reason that the law will never suffer an injury and a damage without a remedy."

Whilst we are of opinion that the evidence in the cause clearly establishes a legal cause of action in the appellant, we do not think he has framed his declaration to meet the testimony which he has offered. In the case of *Chiple v. Atkinson*, 23 Fla. 218, 219, 11 Am. St. Rep. 374, from which we have just quoted, the court says: "The case made by the declaration is that the employment was under an agreement, by which it was to be continued for a long period of time. An agreement between the plaintiff and Kehoe and Walker for the continuance of the employment for a long period of time cannot be ignored as a feature of the case. This allegation means that the agreement entered into by them entitled the plaintiff, either expressly ⁴¹¹ or by implication, to

employment, not only for a period of time, but for a long period. It means that a period of time was agreed upon by them, and means that the period thus agreed on was, whether limited by months, or years, or otherwise, to be proved. The language implies that there was at least some point of time in the future, ascertainable from the terms of the agreement, up to which the employment was to extend. That the continuation of the employment for any time was dependent upon the condition of a satisfactory performance of his duties by the plaintiff, would not be inconsistent with an employment for a particular period. If there was no agreement for any particular period of time, but the employment was one in which the agreement was that plaintiff should be given employment as long as he performed his work satisfactorily, and he has been discharged from it solely through the malicious and wrongful procurement of the defendant, and injury has resulted, he should have laid his case accordingly; but such is not the averment here."

We are therefore of opinion that, upon proper amendment of the declaration, there is evidence in the cause legally sufficient to be submitted to a jury, but because the declaration fails to state a cause of action, to which the evidence offered is legally applicable, and there is a substantial variance therein, we must affirm the judgment of the court below; but, it appearing to the court that a new trial ought to be had, we will remand the case, to the end that the same may be again tried, in accordance with article 5, section 20, of the code.

Judgment affirmed, and cause remanded for a new trial; costs to be paid by appellee.

LABOR UNIONS—LIABILITY FOR INTERFERING WITH EMPLOYEES OR BUSINESS.—This question is treated at length in the monographic note to *State v. Stewart*, 59 Am. Rep. 720 731.

MASTER AND SERVANT—LIABILITY FOR PROCURING DISCHARGE OF SERVANT.—An employee may maintain an action for damages against one who maliciously procures his employer to discharge him from his employment: *Chipley v. Atkinson*, 23 Fla. 206; 11 Am. St. Rep. 367, and note.

BOYCOTTING—INTERFERING WITH THE BUSINESS OF ANOTHER.—Discharged union workmen will be restrained from gathering about their former employer's place of business and annoying, intimidating, or interfering with non-union workmen employed by him: *Murdock v. Walker*, 152 Pa. St. 595; 34 Am. St. Rep. 678; *Sherry v. Perkins*, 147 Mass. 212; 9 Am. St. Rep. 689, and note. Where one's business is interfered with wantonly and maliciously, causing, as was intended, pecuniary injury to him, the party causing such interference is liable in an action for damages: *Delz v. Winfree*, 80 Tex. 400; 26 Am. St. Rep. 755, and note.

MASON v. SUPREME COURT OF THE EQUITABLE LEAGUE.

[77 MARYLAND, 483.]

A CORPORATION CANNOT BE DISSOLVED BY A COURT OF EQUITY unless the power to declare such dissolution has been conferred by statute.

CORPORATIONS.—A RECEIVER WILL NOT BE APPOINTED to take charge of a beneficial corporation, and to administer its assets where it is not alleged to be insolvent. The granting of the relief would necessarily result in the dissolution of the corporation, and the forfeiture of its charter, and this a court of equity has not power to declare and enforce.

Lewis Hochheimer, Sidney Hall, Charles A. Briscoe, and O. Parker Baker, for the appellants.

Ferdinand C. Dugan, George R. Willis, Charles C. Rhodes, and George A. Hooper, for the appellee.

483 FOWLER, J. The appellants filed a bill in the circuit court of Baltimore city against the appellee, a corporation formed **484** under the general incorporation law of Maryland, and the prayer is that a receiver may be appointed to take charge of and administer the assets of the defendant corporation under the order of the court, and for an injunction restraining the officers and agents of said defendant from receiving or collecting any money or assessment due or coming to it, and from interfering with its property or assets, and for general relief.

The defendant answered, testimony was taken, and a decree was passed dismissing the bill. The appellee is what is known as a beneficial assessment association.

The first question is one of jurisdiction, and we are all of opinion that the learned judge below properly refused to appoint a receiver and issue the injunction on the allegations contained in the bill, for the granting of such relief would necessarily result in a dissolution of the corporation, and a forfeiture of its charter.

The defendant was not alleged to be insolvent; certainly not so alleged as to bring the case within section 264 of article 23 of the code; and, even if the allegation of insolvency had been sufficient, we find no proof to sustain it. Nor are there any allegations in the bill looking to proceedings under section 265 of the same article, providing for a voluntary dissolution.

Apart from statutory power, a court of equity cannot dissolve a corporation. "It is true," says Mr. High, in his book

on Receivers, section 238, "equity may properly compel officers of corporations to account for any breach of trust in their official capacity; yet, in the absence of statutes extending its jurisdiction, it will usually decline to assume control over the management of the affairs of a corporation upon a bill . . . alleging fraud, mismanagement, and collusion on the part of the corporate authorities, since such interference would necessarily result in the dissolution of the corporation, ⁴⁸⁵ and the court would thus accomplish indirectly what it has no power to do directly."

"The remedial power exercised by courts of equity in such cases ordinarily extends no further than the granting of an injunction against any special misconduct on the part of the corporate officers; and, although the facts shown may be sufficient foundation for such an injunction, the court will not enlarge its jurisdiction by taking the affairs of the corporation out of the management of its own officers, and placing them in the hands of a receiver." We have quoted at length Mr. High's lucid statement of the well-settled principles applicable to a case like this, because, in our opinion, it is conclusive of the question we are considering. This court, however, has announced the same doctrine.

In *Goodman v. Jedidjah Lodge*, 67 Md. 117, which was a bill filed by a minority of the members of a beneficial association, alleging fraud, mismanagement, etc., on the part of the corporate authorities, it was held that, even if the corporation had been guilty of the acts complained of, "this would only be cause for the annulment of its charter by the legislature, or for proceedings against it as provided by the corporation laws: Rev. Code, art. 67, secs. 1-9. A corporation can also be dissolved, but the mode for doing this is also provided by law: Rev. Code, art. 67, secs. 10-22."

"But," continues this court, "this bill is not a proceeding under either of these provisions of the code, and the court has no power upon such a bill either to dissolve the corporation or to forfeit its charter, or to correct any supposed misuse or abuse of its corporate powers, and it seems to us that the successful prosecution of one or the other of these remedies is essential to the relief asked by these complainants."

But, if the defendant corporation has, as alleged, issued or made contracts of insurance, this, if an abuse ⁴⁸⁶ of corporate power, could not be reached by a bill, like the one before us, filed by a member or certificate holder for the dissolution of

the corporation; but such proceedings for such purpose must, under the provisions of the code, article 23, section 255, be instituted in the name of the state by authority of the governor.

We may add, however, that aside from any question of jurisdiction, we do not think the appellants are entitled to the relief asked, upon the facts contained in this record.

The testimony as to insolvency, mismanagement, fraud, and abuse of corporate powers is not of such a satisfactory and conclusive character as would justify the court, if it had the power, in destroying the corporation: *Baltimore etc. R. R. Co. v. Cannon*, 72 Md. 493.

The appellants had ample opportunity to enforce their alleged rights and claims. If they were unjustly excluded from the benefits and privileges of membership, the rules of the order provided a mode by which they could demand restoration at the hands of a tribunal established by the order itself: Art. 7, sec. 310, of the constitution of the order. And, if they failed to get justice within the order, they still had the right to appeal to the law of the land.

If the officers of the order should be guilty of misconduct, fraud, or mismanagement, a court of equity has full power to restrain and enjoin them; but it will not, as we have seen, take away the rights of the share or certificate holders, either by dissolving the corporation, or by placing its affairs in the hands of a receiver: *High on Receivers*, sec. 288; *Waterbury v. Merchants' Union Exp. Co.*, 50 Barb. 166; *Baltimore etc. R. R. Co. v. Cannon*, 72 Md. 493.

Decree affirmed, with costs to appellants.

CORPORATIONS—DISSOLUTION BY COURTS OF EQUITY.—This question is fully discussed in the extended notes to *Folger v. Columbian Ins. Co.*, 96 Am. Dec. 756, and *Cortleyou v. Hathaway*, 64 Am. Dec. 485.

RECEIVERS OF CORPORATIONS are appointed only in case of the insolvency of the corporation: Extended note to *Cortleyou v. Hathaway*, 64 Am. Dec. 486. See, also, *Havemeyer v. Superior Court*, 84 Cal. 327; 18 Am. St. Rep. 192.

BENSON v. BALTIMORE TRACTION COMPANY.

[77 MARYLAND, 535.]

LICENSEES ON THE PREMISES OF ANOTHER.—If, at the request of the principal of a school, a class of his pupils are granted permission to visit the power-house of a traction company, each of the members of such class are mere licensees or volunteers, and, therefore, cannot maintain an action for injuries suffered from falling into a vat of hot water, located in a part of the building insufficiently lighted and of the existence of which no warning was given.

LICENSEE ON THE PREMISES OF ANOTHER, WHO IS.—The distinction between an invitation and a license to go upon the premises of another appears to be that the former is inferred where there is a common interest or mutual advantage, while the latter is inferred where the object is the mere pleasure or benefit of the person using it.

A LICENSEE UPON THE PREMISES OF ANOTHER must enjoy his license subject to its attendant perils. No duty is imposed on the owner or occupant to keep the premises in a suitable condition for those who come there solely for their own pleasure, and who are not either expressly invited to enter or induced to come upon them by a purpose for which the premises are appropriated and occupied, or by some preparation or adaptation of the plan for use by customers or passengers which might naturally and reasonably lead them to suppose that they might properly and safely enter there.

THE FACT THAT A LICENSEE IS PERMITTED TO VISIT AND INSPECT THE PREMISES of a traction company does not impose upon the company the duty of guarding him from dangers, nor of giving him such warnings as will make his passage through the premises reasonably safe. If there is a dangerous vat of hot water intended to subserve a useful purpose, and not in any proper sense a mantrap, the owner of the premises is not required to make any change therein, owing to the visit he has permitted, nor is he under obligation to detail an employee to attend a visitor through the establishment, and thereby secure him from peril.

C. Hopewell Warner, Thomas Mackenzie, and John V. L. Findley, for the appellant.

N. P. Bond, H. Munnikhuysen, and Robert D. Morrison, for the appellee.

536 ROBERTS, J. On the 3d of February, 1892, John W. Saville, principal of the Baltimore Manual Training School, addressed a note to T. Edward Hambleton, the president of the Baltimore Traction Company, in the following words:

“BALTIMORE MANUAL TRAINING SCHOOL,

“311 to 327 Courtland street,

“John W. Saville, Principal.

“February 3, 1892.

“*President Hambleton,*

“SIR: Will you kindly grant permission to the graduating

class of this school to visit the two power-houses of the Baltimore Traction Company?

“Respectfully,

“JOHN W. SAVILLE.”

537 Upon which there was indorsed the following: “Admit the class as requested.

T. EDWARD HAMBLETON,

“President.”

The appellant, who was then a student in the Manual Training School of Baltimore, and a member of the graduating class therein, together with thirty or more scholars and teachers of said school, on the 12th of February, 1892, visited the power-house of the appellee, located on Druid Hill avenue, in Baltimore city, and were admitted, and, whilst passing through the building, the accident happened which occasioned this suit. On the 28th of October, 1892, the appellant brought suit in the court below, and on the 16th of February, 1893, filed his declaration, embodying therein the facts relied upon, and claiming damages for the injury which his son had sustained by the alleged negligence of the appellee. The appellee, upon the filing of the declaration, demurred thereto, and, on issue joined thereon, the court sustained the demurrer, and entered judgment for the appellee. This appeal is taken from the ruling and judgment of the court below on the demurrer. The declaration contains two counts, in the first of which are the following averments:

1. That the plaintiff, on or about the twelfth day of February, 1892, whilst a student in the Manual Training School of Baltimore, and a member of the graduating class therein, was, with thirty-odd other scholars and the teachers thereof, granted special written permission by the defendant company to visit a certain power-house situate in said city, the property of the defendant, for the purpose of viewing and examining the works and machinery therein contained; that on the day in question, in pursuance of said authority, the plaintiff, in company with his fellow-students 538 and some of the teachers of said school, was, after the presentation of said written permission to defendant's agent, admitted to the said power-house for the purpose aforesaid, and was thereupon taken in charge by one of defendant's agents, who proceeded to show the plaintiff and his companions through the ground floor of said premises, and who afterwards conducted them to the cellar or basement of said building for the purpose of showing

them the workings of the cable and other machinery therein contained, and for a while remained with the said party, warning them as they proceeded and approached certain machinery to guard against particular portions thereof, which he pointed out to them as dangerous; that afterwards, and whilst in the midst of said examination, the said employee abandoned the said party and left them, instructing them, as he did so, to look around for themselves, without, however, warning them of any further danger; that afterwards, whilst thus looking around for themselves upon said premises, in the exercise of due care and caution, and without fault on his part, the plaintiff suddenly, without warning or means of preventing it, fell into a vat, or sink, some two and a half feet deep, full, or nearly so, of boiling water, which vat, or sink, was flush with the floor and uncovered, and situated in a part of the building insufficiently lighted, but through which portion of the premises the course of the examination permitted by defendant led plaintiff and his companions, of which vat, or sink, he had no previous knowledge, and which, owing to the insufficient lighting of the said cellar or basement, plaintiff was unable to see in time to prevent falling therein, of which pitfall the company nor its agents had warned him to guard against, although its existence and dangerous character and the plaintiff's ignorance thereof were known to the defendant, and, in consequence of the neglect of the defendant, he was so badly scalded about ⁵³⁹ the lower part of his body that he has been for a long time confined to his bed, and is sick and disabled, and has been permanently injured, and rendered unfit to earn his livelihood by labor as heretofore.

The second count contains substantially the same averments as those set out in the first, and for the purposes of this case it is not necessary to repeat them.

The demurrer concedes the facts presented by the appellant's pleading, and the question for our consideration is, Do the facts stated entitle the appellant to maintain this action for the recovery of damages for the alleged wrongs which he claims to have sustained? The authorities appear to have classified the subject under three heads, to wit:

1. Bare licensees or volunteers.
2. Those who are expressly invited or induced by the active conduct of the defendant to go upon the premises.
3. Customers and others who go there on business with the occupier.

Each case must largely depend upon the particular circumstances attending the occurrence, and it is not infrequently found to be difficult to determine whether the injured party is a mere licensee, or whether he is on the premises by the implied invitation or enticement of the owner or occupier. Those who enter on business usually experience but small difficulty in defining their legal *status*. There ought to be no controversy in this case as to the object which the appellant had in seeking admission to the power-house of the appellee. It certainly was not for the benefit of the appellee that the visit was made, but it was clearly a mere license from the appellee, assenting to the visit of the appellant and his school-mates to an examination of the works and machinery in the power-house, for the purpose of gratifying their curiosity, or of improving their knowledge of the workmanship of the machinery, and of the manner in which such power was ⁵⁴⁰ applied in moving the cars upon the streets of the city. There could not have been, under these circumstances, any possible opportunity for misconception as to the intention of the respective parties. Nor do we perceive where any benefit could have accrued to the appellee by the visit of these young men on the occasion mentioned. When the president of the appellee indorsed on the application of Mr. Saville, "admit the class as requested," could any reasonable inference be drawn from such indorsement that the appellee was seeking to entice, allure, or induce the plaintiff and his associates to visit the power-house in question? The building in question was not constructed or used for exhibition or display, and the permission granted could only have been intended to give to the graduating class of the Manual Training School an opportunity to examine the application of vast power, obtained through the instrumentality of machinery of unusual character, and thus supply the class with an interesting object lesson in practical mechanics. The vat, or sink, in question was one of the appliances in use by the appellee at the time of the happening of the accident, for the purpose of aiding in the accomplishment of the work to be done, and was not placed there as a mantrap. That it was located in a part of the building which was insufficiently lighted to enable the appellant to see it in time to prevent falling therein was not negligence fairly imputable to the appellee, but rather was it negligence on the part of the appellant to grope about in a house dedicated to the use of dangerous

machinery and appliances located in an insufficiently lighted place. Take, as illustrating this view, the case of *Pierce v. Whitcomb*, 48 Vt. 127, 21 Am. Rep. 120, where the plaintiff went at night to defendant's home to buy oats. The defendant had no oats which he wished to sell, but by reason of the plaintiff's importunity he agreed to sell him some, and they went together to the barn where the oats were kept. ⁵⁴¹ While the defendant was seeking a measure the plaintiff walked about the barn in the dark, and fell through a hole in the floor, and was severely injured. The court held that traveling about the granary in the dark not only contributed to the injury but was the cause of it, and that defendant was not liable. It has not been contended in this case that the vat, or sink, was such that the appellee, in the conduct of its business, might not lawfully construct or use, nor is it claimed that the injury happened through the willful or wanton misconduct, or gross negligence, of the appellee. As already stated, it is oftentimes difficult to determine whether the circumstances make a case of invitation or only of mere license. "The principle," says Mr. Campbell, in his treatise on Negligence, "appears to be that invitation is inferred where there is a common interest or mutual advantage whilst a license is inferred where the object is the mere pleasure or benefit of the person using it." Equally pointed is the language of Mr. Chief Justice Bigelow, in delivering the opinion of the court in *Sweeny v. Old Colony etc. R. R. Co.*, 10 Allen, 372, 87 Am. Dec. 644, where he says: "In order to maintain an action for an injury to person or property, by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff, which the defendant has left undischarged or unfulfilled. This is the basis on which the cause of action rests. There can be no fault or negligence, or breach of duty, where there is no act or service, or contract, which a party is bound to perform or fulfill. All the cases in the books in which a party is sought to be charged, on the ground that he has caused a way or other place to be encumbered, or suffered it to be in a dangerous condition, whereby accident and injury have been occasioned to another, turn on the principle that negligence consists in doing, or omitting to do, an act by which a legal duty or ⁵⁴² obligation has been violated. Thus, a trespasser who comes on the land of another without right cannot maintain an action if he runs against a barrier,

or falls into an excavation there situated. The owner of the land is not bound to protect or provide safeguards for wrongdoers. So a licensee, who enters on premises by permission only, without any enticement, allurements, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not either expressly invited to enter, or induced to come upon, them by the purpose for which the premises are appropriated and occupied, or by some preparation or adaptation of the plan for use by customers or passengers which might naturally and reasonably lead them to suppose that they might properly and safely enter thereon." Further on he adds: "A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation, on the part of the owner or person in possession, to provide against the danger of accident."

In *Hounsell v. Smyth*, 7 Com. B., N. S., 738, the distinction is clearly drawn between the liability of a person who holds out an inducement or invitation to others to enter on his premises by preparing a way or path, by means of which they can gain access to his house or store, or pass into or over the land, and in a case where nothing is shown but a bare license or permission, tacitly given, to go upon or through an estate; and the responsibility of finding a safe and secure passage is thrown on the passenger, and not on the owner; and the court says: "Suppose the owner of land near the sea gives another leave to walk on the edge of the cliffs, surely it would be ⁵⁴³ absurd to contend that such permission cast upon the former the burden of fencing." Substantially the same distinction is made in *Barnes v. Ward*, 9 Com. B. 394; *Hardcastle v. South Yorkshire Ry. etc. Co.*, 4 Hurl. & N. 67; *Bolch v. Smith*, 7 Hurl. & N. 741; and *Scott v. London Docks Co.*, 11 L. T., N. S., 383.

Mr. Justice Campbell, in *Hargreaves v. Deacon*, 25 Mich. 5, speaking of the existence of pitfalls in the highways and upon private property, says: "Cases are quite numerous in which the same questions have arisen which arise in this case, and we have found none which hold that an accident

from negligence on private premises could make the ground of damages, unless the party injured has been induced to come by personal invitation, or by employment which brings him there, or by resorting there as to a place of business or of general resort, held out as opened to customers or others, where lawful occasions may lead them to visit them. We have found no support for any rule which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience, in no way connected with business or other relations with the occupant." The case in the record is lacking in many elements of strength to be found in the cases we have cited, and presents a bald case of "permission asked, and leave granted." There is no privity of relationship between the parties. The appellant was not in the power-house by virtue of any right to be there; he only escapes being a trespasser because of the appellee's assent. Permission involves leave and license, but bestows no rights: *Bloch v. Smith*, 7 Hurl. & N. 745; *Hounsell v. Smyth*, 7 Com. B., N. S., 738; *Maenner v. Carroll*, 46 Md. 222. It has been earnestly contended that, by the admission of the appellant to the power-house in the manner stated, a duty was thereby imposed upon the ⁵⁴⁴ appellee to guard the appellant from the dangers of said vat, "by warning him of its existence, or by covering the same, so as to make his passage through said premises reasonably safe." In this we do not concur. The vat was apparently a part of the useful appliances connected with the purposes for which the power-house was constructed, and was, as we have already said, in no proper sense a man-trap.

The appellee was under no obligation to take one of his employees from his work to conduct the appellant and his schoolmates and their teachers through the power-house; nor was the appellee required to make alterations in the manner in which it was accustomed to conduct its business, in order that these young men might go with safety through the building. They were under the control and direction of the teachers who accompanied them, and the appellee might have reasonably inferred that they were sufficiently cared for. Even though the guide had continued with the class, there was no reasonable guaranty that one of these thirty boys would not have fallen into the self-same vat.

The principal of the school had, doubtless, some conception of the character of the machinery and appliances contained in the power-house, otherwise he would scarcely have sought admission, and, if there was negligence any where, it consisted in bringing thirty-odd boys at one time to a building filled with dangerous machinery. It is doubtless true that if the appellant had remained with his fellows, and contented himself with their more prudent course, he would not have met with the painful accident which befell him. In the case of *Galveston Oil Co. v. Morton*, 70 Tex. 400, 8 Am. St. Rep. 611, a party called at the office of the appellant, and requested permission to see one of its employees. He was informed by some one in the office where he would likely find the person he sought, and he went into the building for the purpose of finding him, and in his search he passed through a room where a large quantity of cotton-seed was being manipulated, and stepping upon a pile of cotton-seed, a foot and a half or two feet in depth, his foot sank down through the seed into a screw or endless worm under the floor, and was thus injured. The worm was concealed from view by the cotton-seed, which may have been in motion, but was not seen by the appellee, who had no knowledge of the existence of the worm. The appellee's business was with the employee he sought, and not with the appellant. He did not request a guide, nor was any furnished, and no warning was given him of the danger. In this state of case the court, Maltbie, J., delivering the opinion, said: "In our opinion the facts fail to show that appellant owed appellee the duty to send a guide along to prevent him from becoming entangled in the machinery and being injured, for the reason he was not there on business with appellant, or by its invitation, either express or implied, because he made no request for any one to accompany him. To require the proprietor of a steamboat, a factory, or a mill, conducted in the usual manner, whenever a man should ask permission to see an employee, engaged in his duties, to anticipate that such person might become involved in some dangerous machinery, hidden or open, would be to exact too high a degree of diligence; but the presumption should be indulged that the person making the inquiry is acquainted with the machinery, its construction and position, and needs no attendant, or otherwise he would have made a request to that effect."

In the recent case of *Ivay v. Hedges*, L. R. 9 Q. B. D. 80, the court went very far in support of the doctrine of non-liability of an owner for injuries occasioned to others while upon his premises. There a landlord let out a house to several tenants, each of whom had the privilege of using the roof for the purpose of drying ⁵⁴⁶ their linen. The plaintiff, one of the tenants, while on the roof, slipped, and the rail being out of repair (and known by the landlord to be so), fell through it into the court below. Lord Coleridge said that no liability rested upon the defendant for not keeping the rail in repair, in the absence of an absolute contract for the use of the roof, and held that "the tenant takes the premises as he finds them." The opinion of Lindley, J., in the case of *Burchell v. Hickisson*, 50 L. J. Com. P. 101, is to the same effect.

In the appellant's brief there appears a quotation from the opinion of the court in *Maenner v. Carroll*, 46 Md. 218, which is thought to sustain his contention in this court. It reads as follows: "There is no doubt of the general proposition, that an obstruction or excavation made on a party's own land, and lawfully made, may give rise to an action, upon proof that such obstruction or excavation was concealed, and the plaintiff was invited or induced by the act or conduct of the defendant to pass over or near such obstruction, in ignorance of its existence, whereby injury resulted. In such case the plaintiff would have a right to rely upon the good faith of the defendant." This is, however, only a part of the paragraph, and is somewhat misleading. We complete the paragraph, which reads as follows: "And to this effect are several of the authorities relied on by the plaintiff's counsel in this case; but there is nothing shown on the face of the count under consideration to justify the conclusion that the plaintiff was in any manner invited or induced, by any act of the defendants, to pass over the lot where the accident occurred." And so in this case we are compelled to say, that there is nothing in the declaration, supplemented with the request of Mr. Saville and the assent of the appellee, to justify the conclusion, that the appellant was in any manner invited or induced, by any act of the appellee, to visit ⁵⁴⁷ its powerhouse, but he went there solely for his own personal benefit and pleasure, and he must accept the consequences, unfortunate though they be.

It follows from what we have said, that the court below committed no error in sustaining the demurrer to the declaration, and the judgment must be affirmed.

Judgment affirmed.

LICENSEES ON THE PREMISES OF ANOTHER.—For a thorough discussion of this question, see *Gibson v. Leonard*, 143 Ill. 182; 36 Am. St. Rep. 376; and *Plummer v. Dill*, 156 Mass. 426; 32 Am. St. Rep. 463, and the extended note thereto.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

BENJAMIN V. HOLYOKE STREET RAILWAY COMPANY.

[160 MASSACHUSETTS, 3.]

NEGLIGENCE.—WHETHER THE MERE FAILURE TO LOOK FOR A STREET-CAR by a person driving along the street is negligence is a question for the jury under proper instructions.

NEGLIGENCE.—THE CONTINUING OF THE DRIVER OF A STREET-CAR TO KEEP UP ITS SPEED AND TO KEEP SOUNDING A GONG when it is obvious that a person driving along the street is in difficulty from the fright of his horse, may be evidence of negligence sufficient to warrant the jury in finding the existence of such negligence, and that the accident which followed was the result thereof.

PLEADING—NEGLIGENCE.—A GENERAL AVERMENT OF NEGLIGENCE in the management of a street-car, whereby plaintiff's horse was caused to spring to one side and upset the vehicle in which he was riding, is sufficient to include negligence in the injudicious sounding of a gong.

EVIDENCE—EXPERT.—IT IS PROPER TO ALLOW A PHYSICIAN to testify whether or not certain injuries sustained by plaintiff were, in his opinion, sufficient to produce her miscarriage, and to give the reasons why this result might follow.

ACTION in tort to recover compensation for injuries sustained by plaintiff in being thrown from a carriage. At the trial certain questions were asked her physician and admitted as against the objections of the defendant. These questions and the answers thereto were as follows: "If a woman was with child and met with an accident, so that she was thrown over the footboard of a wagon by a runaway horse, thrown to the ground on her stomach or side, went home and soon after went to bed, and if she was confined to the bed for ten or twelve days, and if at the end of that time she suffered a miscarriage, would the facts, if true, be an adequate cause for a miscarriage?" A. "It would be considered an adequate

cause for the miscarriage." "If a woman was with child, and was thrown over the dashboard by a runaway horse, and struck upon her stomach or her side, that is, thrown over upon the ground, would it be possible for the foetus to be killed?" A. "It would be possible." "In what way?" A. "It might be killed from direct violence of the blow, or by a separation of the placenta from the womb. The placenta is what carries the blood from the inside of the womb, from the mother's body to the child's body. In a sudden jar, that might be separated, so that the foetus would derive no more blood from the mother. It might possibly be such an injury to the womb itself as to produce a miscarriage from that injury." "If the child was killed by this fall of the mother we have described, from a team to the ground, and a miscarriage took place ten or twelve days after, would the body of the foetus be decomposed necessarily?" A. "No, not necessarily." "Is the presence of flesh on the woman conclusive evidence whether she has uterine trouble or not?" A. "It is not. A great many women increase in flesh when they have uterine trouble, as the result of certain uterine troubles." Verdict for the plaintiff, and the defendant alleged exceptions.

W. H. Brooks, for the defendant.

A. L. Green, for the plaintiff.

4 ALLEN, J. The case which the plaintiff's evidence tended to support was as follows: Appleton and Beech streets crossed each other at right angles. There was an electric street railway on Appleton street. The plaintiff was driving on Beech street towards Appleton street, saw a car pass, thought it would be safe to cross, and drove on to Appleton street as if to cross it, the roadbed being thirty-four feet wide. As she got almost upon the railway track another car was coming, her horse became frightened, she turned him so as to go along on Appleton street by the side of the track, the car came following on, the motorman was sounding the gong, and when the car overtook her, and was just alongside, the gong was sounded again, the horse sprang to the side of the street, and the accident occurred. The view from Beech street of that part of Appleton street on which the car was coming was obscured by an orchard and a barn.

The defendant contends that there was no evidence of the plaintiff's due care. The first particular assigned is, that the

horse which she was driving was manifestly an improper one for her to undertake to manage. This, however, was for the jury, on all the evidence. The next particular assigned is, that she failed to look to see if a car was coming; and a special instruction was asked, based on the assumption that she failed to look. This also was for the jury. The accident did not occur from a collision at the street crossing. The plaintiff had passed that point, and was proceeding on Appleton street. The court rightly refused to instruct the jury that a mere failure to look would prevent her from recovering. This has been so held even in cases of collision: *Shapleigh v. Wyman*, 134 Mass. 118; *French v. Taunton Branch R. R.*, 116 Mass. 537. The question was left to the jury, with proper instructions.

The defendant further contends that there was no evidence of its own negligence. But the jury might well find negligence on the defendant's part from the testimony tending to show that the ⁵ car was not stopped, nor its speed slackened, and that the gong was sounded while the plaintiff was in obvious difficulty from the fright of her horse. The defendant contends that it was not bound to stop its car, or to stop the noise of the gong. But the omission to do so, under the circumstances, might well be deemed to show carelessness. The use of the street for electric cars, and by the general public, was concurrent; and the defendant was bound, in using the street, to have reference to its reasonable use by others: *Commonwealth v. Temple*, 14 Gray, 69; *Driscoll v. West End Street Ry. Co.*, 159 Mass. 142.

It was not necessary specially to set forth in the declaration the injudicious sounding of the gong as an element of negligence. Sounding the gong is an incident to the running of the car, and the general averment of negligence in the running of the car was sufficient to include it: *Eaton v. Fitchburg R. R. Co.*, 129 Mass. 364.

The objections to the questions put to the doctor are not sufficiently serious to require discussion. There was no error in allowing them to be put.

Exceptions overruled.

STREET RAILWAYS—NEGLIGENCE—QUESTION FOR JURY.—In an action to recover for an injury received in a collision with a car while driving upon a street railway track at night, the question of reasonable diligence and ordinary care to prevent a collision on the part of the plaintiff, and of negligence

on the part of the railway company, is for the jury to determine: *Rascher v. East Detroit etc. Ry. Co.*, 90 Mich. 413; 30 Am. St. Rep. 447, and note.

STREET RAILWAYS—DUTY TO VEHICLES ON TRACK.—A street railway owes a duty to exercise such watchful care as will prevent accidents or injuries to persons who, without negligence, may not be able to get out of the way of a passing car: *Gilmore v. Federal Street etc. Ry. Co.*, 153 Pa. St. 31; 34 Am. St. Rep. 682, and note. Where an ordinance makes it the duty of a street-car driver to keep a vigilant lookout for all persons approaching the track, and to stop the car on the first appearance of danger, a failure to do this is negligence: *Hays v. Gainville etc. Ry. Co.*, 70 Tex. 602; 8 Am. St. Rep. 624. For a full discussion of this question, see the note to *Schnur v. Citizens' Traction Co.*, 34 Am. St. Rep. 682, and the extended note to *Western Paving etc. Co. v. Citizens' etc. R. R. Co.*, 25 Am. St. Rep. 481.

WITNESSES—EXPERTS—PHYSICIAN'S TESTIMONY AS TO EFFECT OF INJURY. A physician, speaking as an expert, may testify as to the effect of an injury: *Evansville etc. R. R. Co. v. Crist*, 116 Ind. 446; 9 Am. St. Rep. 865; *McClain v. Brooklyn etc. R. R. Co.*, 116 N. Y. 459; *Texas etc. Ry. Co. v. Burnett*, 80 Tex. 536; *Illinois etc. R. R. Co. v. Latimer*, 128 Ill. 163; *Abbott v. Duinnell*, 74 Wis. 514. See the extended note to *Hammond v. Woodman*, 66 Am. Dec. 235.

GRANT v. FITCHBURG.

[160 MASSACHUSETTS, 16.]

IF THE NEGLIGENCE OF A PARENT CONTRIBUTES TO THE DEATH of a child too young to be capable of taking care of himself, his testator cannot recover therefor against another, to whose negligence such death was also due.

THAT THE NEGLIGENCE OF A PARENT CONTRIBUTED TO THE DEATH OF A CHILD, so that there can be no recovery therefor, is established by proof that he was only twenty months old, that when last seen before his death he was at the open gateway of a dooryard at the boundary of a public street, that he had been left alone there once before on that day, and that on this occasion his mother took no measures to ascertain where he was for a quarter of an hour or more, that he went out upon the street unattended, and in some way, not discovered, got through a hole in a curbstone into a catch-basin, from which his death resulted.

H. Parker, for the plaintiff.

E. P. Pierce, for the defendant.

16 KNOWLTON, J. In this case we have no occasion to consider whether there was evidence of negligence on the part of the defendant, for we are of opinion that there was no evidence that the plaintiff's intestate was in the exercise of due care. He was a child twenty months old, and was incapable of exercising care for himself. It was the duty, therefore, of his mother, in whose custody he was, to care for him, and, if

his death is imputable to her negligence, the plaintiff cannot recover.

He was last seen by her before his death at the open gateway ¹⁷ of the dooryard, at the boundary of the public street; he had been playing about there, and once before, on the same afternoon, had been alone to the house of a neighbor, which was the third house from his home, on the same street, and his mother had been obliged to go and find him, and bring him back. When she saw him at the gate she was sitting talking with another woman on the steps at the rear of the house, and she gave no further attention to him, and took no measures to ascertain where he was for a quarter of an hour or more. In the mean time he had been out on the street unattended, and had been playing with other children, and in some way, no witness knew when or how, had got through the hole in the curbstone into the catch-basin. His absence from home, unattended on the public street, was *prima facie* evidence of negligence on the part of his mother, and there was no evidence in the case which tends to show a justification or excuse for her failure to look after him for fifteen minutes after she saw him at the gate. In this last respect the case differs from *Slattery v. O'Connell*, 153 Mass. 94, and *Creed v. Kendall*, 156 Mass. 291. The doctrines stated in *Gibbons v. Williams*, 135 Mass. 333, are applicable to the facts of this case, and are decisive of it: *Wright v. Malden etc. R. R. Co.*, 4 Allen, 283; *Callahan v. Bean*, 9 Allen, 401.

Exceptions overruled.

NEGLIGENCE OF CHILDREN—EFFECT OF CONTRIBUTORY NEGLIGENCE OF PARENT.—If a child is too young to take care of himself, it is the duty of his proper custodian to care for him; and in an action to recover for injuries caused by the negligence of another, if his custodian was negligent, that negligence is imputed to the child: *Casey v. Smith*, 152 Mass. 294; 23 Am. St. Rep. 842, and note; *Pittsburg etc. Ry. Co. v. Vining*, 27 Ind. 513; 92 Am. Dec. 269, and note. The contrary doctrine is maintained in *Pratt Coal etc. Co. v. Brtnoley*, 83 Ala. 371, 3 Am. St. Rep. 751, and *Wymore v. Mahaska County*, 78 Iowa, 396, 16 Am. St. Rep. 449; while in *Norfolk etc. R. R. Co. v. Groseclose*, 88 Va. 267, 29 Am. St. Rep. 718, and note, and *Western Union Tel. Co. v. Hoffman*, 80 Tex. 420, 26 Am. St. Rep. 759, it was held that the negligence of the parent causing the child's injury would bar a recovery by the parent, but would not be imputed to the child. This question is fully treated in the extended notes to *Westbrook v. Mobile etc. R. R. Co.*, 14 Am. St. Rep. 591; *Erie etc. Ry. Co. v. Schuster*, 57 Am. Rep. 474, and *Kerr v. Forgue*, 5 Am. Rep. 148; and the note to *Westerberg v. Kinzua Creek etc. R. R. Co.*, 24 Am. St. Rep. 510.

WISWELL v. DOYLE.

[160 MASSACHUSETTS, 42.]

NEGLIGENCE OF A PARENT in suffering a child to go upon a public street, unattended, when it is too young to exercise proper care of itself, will not preclude a recovery for injuries sustained by it from the negligence of a third person, if, while on the street, it did nothing which could be deemed careless if its movements had been directed by an adult person in charge, of ordinary and reasonable prudence. Hence, if, though unattended, it started to run across a street in front of a horse and carriage then standing still, and in charge of the owner, who was sitting in the vehicle talking to another person, and such owner, without looking, suddenly started his horse, and thereby caused it to run over the child, the negligence in leaving it without attendants does not preclude a recovery, if its act in running across the street under the circumstances was, in the opinion of the jury, such an act as it might have been permitted and directed to do had it been in charge of a prudent adult.

TORT for personal injuries to plaintiff's intestate, a child four years of age, suffered by her from being run over in a public street by a horse and carriage owned and driven by the defendant. The plaintiff asked the court to instruct the jury as follows: "It does not necessarily follow, because a parent negligently suffers a child of tender age to cross a street, that therefore the child cannot recover. If the child without being able to exercise any judgment in regard to the matter, yet does no act which prudence would forbid, and omits no act which prudence would dictate, there has been no negligence which was directly contributory to the injury. The negligence of the parent in such a case would be remote." This instruction was refused, and the following given: "In this case I do not think, and I know it would not be right for the court to say, as a matter of law, that the mother was careless in allowing the child to be on the sidewalk; or that the child itself was so negligent as not to be able to recover in this case. The court does not undertake to decide that. It is for you. . . . The law says, if the parent is careless, and the carelessness of the parent contributed to the injury, then that is to affect the right of the child to recover as much as the carelessness of the child itself would. . . . Therefore, take the first part of this case, and say as men with experience, that you have the knowledge of children, and say whether or not this accident was caused by, or in part by, want of care on the part of that mother. If you find that she did not exercise that degree of care which the law requires of a parent, and which parents of ordinary love and affection

for children, and prudence and foresight and knowledge about childhood, would take under the circumstances, that is the care which this woman ought to have taken in this case, and you will decide whether she was or was not careless. Then as to the child itself. Of course, a child four years of age, from its inexperience and want of knowledge, the degree of care and the amount of care that you would expect of such a child would not be very great. They may exercise some care, and the degree of care is to be measured by the capacity of the child, and you are not to judge the child by the standard which you would apply to an adult. If the care or carelessness of the mother and child, combined or separate, contributed to this injury, then this action cannot be maintained." Verdict for the plaintiff, and the defendant alleged exceptions.

W. Thayer and H. W. Cobb, for the plaintiff.

R. Hoar, for the defendant.

⁴² ALLEN, J. The plaintiff's counsel, in the request for instructions, which was refused, assumed that the child's mother might be found to have been negligent; but his request was founded on the view that, although it was careless in the mother to allow her children to be upon the street unattended, still her negligence did not lead to the accident, as there was nothing in the conduct of the child herself which was inconsistent with due care.

It is certainly possible for a case to exist where, although it may be careless to let a young child go alone upon a street, yet ⁴³ the child may have been injured by the carelessness of somebody else while it was in a place proper for young children to be, and while doing nothing likely to lead to its injury. When a child is too young to have any intelligence or discretion in regard to taking care of itself in a public street, and when it has carelessly been allowed to go there unattended; still, while upon the street it may have done nothing which would be deemed dangerous or lacking in due care, provided its movements had been directed by an adult person of reasonable and ordinary prudence in charge of it, and yet it may have been hurt through the carelessness of another person. Under such circumstances, it may recover damages for the injury: *Lynch v. Smith*, 104 Mass. 52; 6 Am. Rep. 188; *Gibbons v. Williams*, 135 Mass. 333; *Collins v.*

South Boston R. R. Co., 142 Mass. 301; 56 Am. Rep. 675; *Casey v. Smith*, 152 Mass. 294; 23 Am. St. Rep. 842; *McGuinness v. Butler*, 159 Mass. 233; 38 Am. St. Rep. 412. The plaintiff's request was in accordance with this view of the law, but the presiding justice declined to give it, stating in the bill of exceptions that he did not regard it as appropriate to the evidence in the case, or required by the state of the evidence.

In order to test the correctness of this refusal, let it be assumed that the mother was careless in allowing her children to go unattended upon the street, and that the children were both too young to have any judgment or discretion of their own. Under these circumstances, the plaintiff must be held to show that the child did nothing upon the street which would be deemed dangerous or careless if its movements had been directed by an adult person in charge, who was of ordinary and reasonable prudence.

The plaintiff's evidence tended to show, and the jury would have been warranted in finding, that the children were across the street from their home, seeing others jump the rope; that the street was about fifty feet wide, and very frequently traveled; that the only carriages and horses at that time upon that part of the street were those of the defendant and of Webb; that just before the accident the defendant sat in his carriage looking back and talking with Webb, who was sitting in another carriage just behind; that there was one horse to each carriage, and both horses were standing still, and under control of their drivers; that the child started to run across the street just in ⁴⁴ front of the defendant's horse while the horse was standing still, and, when it got almost in front of the horse's head, the defendant, while looking behind him and talking with Webb, and without looking ahead, reined up his horse quickly and started up quickly, and ran over the child. We cannot say, as matter of law, that if a nurse, or other competent person, had been in charge of the child at the time, and had told it to run across the street in front of the defendant's horse, this would have been a careless or negligent thing to do. Teams are often stopped in the streets, sometimes in the middle, and perhaps oftener on the sides. The evidence tended to show that the defendant's horse was under control, and was not restive or impatient, and that it waited quietly, until the defendant started it up without looking to see if anybody was in the way. It seems

to us that the view of the law involved in the request for instructions was not sufficiently expressed to the jury; that the evidence of the plaintiff was such as to entitle the plaintiff to have that doctrine stated to the jury with proper explanations; and that the plaintiff may have suffered from the omission to do so.

Exceptions sustained. —

NEGLIGENCE OF PARENT, WHEN WILL NOT BAR RECOVERY BY CHILD.—Where a young child is negligently allowed by its parents to go into the public street, yet does no act which prudence would forbid, there is no negligence contributory to an injury which will prevent a recovery by the child: *Lynch v. Smith*, 104 Mass. 52; 6 Am. Rep. 188; *Ihl v. Forty-second Street etc. R. R. Co.*, 47 N. Y. 317; 7 Am. Rep. 450. To the same effect, see *Robinson v. Cone*, 22 Vt. 213; 54 Am. Dec. 67.

McGUIRK v. SHATTUCK.

[160 MASSACHUSETTS, 45.]

MASTER AND SERVANT.—If a laundress is being conveyed from her place of residence to her place of work in a vehicle driven by the coachman of her employer, and an accident occurs, she must be regarded as being in the service of her employer at that time, and as assuming the perils incident to that service.

MASTER AND SERVANT—FELLOW-SERVANTS.—A LAUNDRESS AND A COACHMAN OF HER EMPLOYER who is in charge of a horse and vehicle in which she is being conveyed from her home to her place of work are fellow-servants, and she, therefore, cannot recover of their common employer for injuries suffered from the negligence of the coachman.

MASTER AND SERVANT—UNSAFE VEHICLE.—If a vehicle in which a servant is to ride to the place of work is unsafe, by reason of not having a proper seat, and this is obvious, and she, being aware of it, puts in a camp-chair and sits in it, and this mode of riding is not safe, it is her own act rather than the negligence of the employer, and if it leads to injury, she cannot recover.

TORT against William B. Shattuck and his wife Elizabeth, for personal injuries alleged to have been occasioned to plaintiff by negligence. The plaintiff was employed as a laundress by the defendants, and her home being some distance from her place of work, the defendants sent their carriage and coachman on several occasions to convey her from her home to theirs. On the day the accident occurred, when the team and the coachman arrived, the plaintiff noticed that one of the seats of the wagon was gone, and on being told that it was broken, and seeing that there were more persons than

could comfortably ride on the remaining seat, she got a camp-chair and placed it in the wagon, directly back of the seat, and sat thereon, holding her little boy in her lap, while the coachman and a dressmaker sat on the seat. The coachman drove rapidly down a slight grade to a point where he was required to turn a corner, and there, raising his hand to salute a friend, did not retain proper control of the horse, and it turned so short that the wagon slewed round, the fore wheels striking some object, and the plaintiff was thrown out and injured. The court, at the request of the defendants, ruled that, under these circumstances, the plaintiff was not entitled to recover. A verdict for the defendants was therefore directed, and the plaintiff alleged exceptions.

F. H. Cande, for the plaintiff.

C. E. Burke and T. P. Pingree, for the defendants.

47 ALLEN, J. 1. The plaintiff must be regarded as having been in the service of the defendants at the time of the accident. Whether the transportation of the plaintiff was entirely gratuitous, as it seems to have been, or whether it was in pursuance of such an understanding between the parties that it may be deemed to have been a part of the contract, in either case it was incident to the service which the plaintiff was to perform, and closely connected with it. In this respect the case falls directly within the principle of *Gillshannon v. Stony Brook R. R. Co.*, 10 Cush. 228. See, also, *Seaver v. Boston etc. R. R. Co.*, 14 Gray, 466; *Gilman v. Eastern R. R. Corp.*, 10 Allen, 233, 238; 87 Am. Dec. 635; *Holden v. Fitchburg R. R. Co.*, 129 Mass. 268, 272; 37 Am. Rep. 343; *O'Brien v. Boston etc. R. R. Co.*, 138 Mass. 387; 52 Am. Rep. 279; *Ryan v. Cumberland Valley R. R. Co.*, 23 Pa. St. 384; *Manville v. Cleveland etc. R. R. Co.*, 11 Ohio St. 417; *Higgins v. Hannibal etc. R. R. Co.*, 48 36 Mo. 418, 433; *Ewald v. Chicago etc. Ry. Co.*, 70 Wis. 420; 5 Am. St. Rep. 178. The accident happened, it would seem, in consequence of the negligence of the driver, who was a fellow-servant of the plaintiff. There was no evidence that the defendants were negligent in the employment of this driver, and there is no contention or suggestion by the plaintiff to that effect. The case, therefore, is the ordinary one where an accident has occurred through the negligence of a fellow-servant, and no recovery can be had.

2. The plaintiff further contends that the defendants were negligent in failing to furnish a safe and suitable wagon. If

the wagon was unsuitable by reason of the want of the second seat, this was obvious; and if the plaintiff, being aware of it, saw fit to put in a camp-chair, and to sit in it, and if this mode of riding was unsafe, it was her own act, rather than the negligence of the defendants, that led to the injury.

Exceptions overruled.

MASTER AND SERVANT—WHEN THE RELATION EXISTS.—This question is fully discussed in the extended note to *Brown v. Smith*, 22 Am. St. Rep. 459.

MASTER AND SERVANT—FELLOW-SERVANTS—WHEN THE RELATION EXISTS, GENERALLY.—All who are servants of a common master, engaged in the same general business, subject to the same general control, and paid out of a common fund, are fellow-servants: *Georgia Pac. Ry. Co. v. Davis*, 92 Ala. 300; 25 Am. St. Rep. 47, and note; *Sherrin v. St. Joseph etc. Ry. Co.*, 103 Mo. 378; 23 Am. St. Rep. 881, and note; *Murray v. St. Louis etc. Ry. Co.*, 98 Mo. 573; 14 Am. St. Rep. 661, and note.

SAUNDERS v. BENNETT.

[160 MASSACHUSETTS, 48.]

MECHANIC'S LIEN.—THAT LABOR IS PERFORMED “BY THE CONSENT OF THE OWNER OF A BUILDING” is not established by proving his knowledge that such labor was being performed, where it does not appear that he knew who was doing the work, nor under what contract, nor that any lien was or might be claimed, and he does not in words express his consent.

MECHANIC'S LIEN—OWNER OF PROPERTY, WHO IS.—One in possession of realty under a contract to purchase cannot be regarded as an owner within the meaning of the statute respecting mechanic's liens. Nor can such a lien be enforced against such person after he has acquired the legal title, unless he has estopped himself from denying that he was the owner at a prior date.

MECHANIC'S LIEN—MORTGAGE.—If one in possession of land under an agreement to purchase, contracts for the erection of a building thereon, and while the work is in progress receives a conveyance, and at the same time, and as a part of the same transaction, executes a mortgage, the lien of the mortgage is paramount to any lien existing in favor of a mechanic for labor in erecting the building.

C. S. Hayden, for the petitioner.

H. Parker, for the respondent.

⁴⁹ **HOLMES, J.** This is a petition to establish a mechanic's lien for labor in erecting a building. The respondent, Bennett, made the contract with the petitioner. At that time Bennett was in possession of the land under a contract to purchase it.

Priest, the managing owner of the land, knew that the labor was being furnished. While the work was in progress Bennett received a conveyance, and, as part of the same transaction, gave a mortgage to one Pierce. When Pierce took the mortgage he knew that the labor had not been paid for, but it does not appear that he knew it before that moment. The court ruled that the lien could be maintained only for the labor furnished after the date of the conveyance to Bennett, and that it was subject to the mortgage to Pierce, evidently taking the ground that only from and after the moment of the conveyance and mortgage, was the labor performed "by consent of the owner of such building," within Public Statutes, chapter 191, section 1.

The facts that Priest knew that the labor was being furnished, and that he spoke with Bennett about furnishing a frame for the house, do not import consent on his part in such sense as to satisfy the statute. Consent has been treated as meaning conduct expressive of consent: *Hayes v. Fessenden*, 106 Mass. 228. It may be that silence is such conduct under some circumstances; but, as the petitioner did not know that Priest was an owner, and as it does not appear that Priest knew who was doing the work, or under what contract he was doing it, or that any lien was or might be claimed by any one, Priest's silence ought not to have such a meaning attributed to it in this case: *Hayes v. Fessenden*, 106 Mass. 228, 230; *Conant v. Brackett*, 112 Mass. 18; *Davis v. Humphrey*, 112 Mass. 309, 314; *O'Conner v. Hurley*, 147 Mass. 145, 148. Again, the case is not like those where the contract between the owner and the purchaser requires the latter to build, and thus, by implication, authorizes him to employ the necessary workmen: *McCue v. Whitwell*, 156 Mass. 205, 207; *Carew v. Stubbs*, 155 Mass. 549, 551.

Hayes v. Fessenden, 106 Mass. 228, 231, also shows that Bennett cannot be regarded as the owner within the meaning of the ⁵⁰ statute before the moment of the conveyance to him, notwithstanding his subsequent acquisition of title. Other decisions establish that his merely instantaneous seisin at that moment did not give the petitioner priority over the mortgage executed at the same time as part of the same transaction: *Perkins v. Davis*, 120 Mass. 408; *Ettridge v. Bassett*, 136 Mass. 314, 317. See *Woodward v. Sartwell*, 129 Mass. 210, 211. If, at the moment of the mortgage, there was no lien

as against Bennett, of course there could be none as against the mortgagee.

In view of what we have said, the only ground on which a lien for the petitioner's labor before the conveyance to Bennett could be claimed as against Bennett, although not as against the mortgagee, is, that Bennett estopped himself by saying that he was the owner of the land, and that the petitioner dealt with him, believing that he was the owner. It is not set forth in the report that the petitioner's belief was due to Bennett's statement, and we cannot assume the fact. It is unnecessary, therefore, to consider whether there could be a lien by estoppel, or otherwise than by actually conforming to the statutory conditions.

The question whether the court was right in allowing a lien for the labor furnished after Bennett got his title is not open on the report.

Judgment accordingly. —

MECHANIC'S LIEN—NECESSITY FOR VALID CONTRACT.—A mechanic's lien cannot exist except where there was a valid contract for the doing of work or the furnishing of materials: *Fish v. McCarthy*, 96 Cal. 484; 31 Am. St. Rep. 237, and note with the cases collected.

MECHANIC'S LIEN—TO WHAT INTEREST ATTACHES.—A mechanic's lien will attach to an equitable interest in land held under a contract of purchase: *Fullmer v. Poust*, 155 Pa. St. 275; 35 Am. St. Rep. 881, and note. See, also, the extended note to *Lyon v. McGuffey*, 45 Am. Dec. 678.

MECHANIC'S LIEN—PRIORITY.—A lien for labor or material is paramount to the lien of a mortgage executed after the building was commenced, but before such labor or material was furnished: *Haxtun etc. Heater Co. v. Gordon*, 2 N. D. 246; 33 Am. St. Rep. 776, and note with the cases collected.

GAMEWELL FIRE ALARM TELEGRAPH CO. v. CRANE.

[160 MASSACHUSETTS, 50.]

CONTRACT IN RESTRAINT OF TRADE.—A contract made by a vendor on selling his business to a corporation that he will not engage in the business of manufacturing or selling fire alarm and police telegraph machines and apparatus, nor enter into competition with such corporation, either directly or indirectly, for the period of ten years, is illegal and void as being in restraint of trade, and not limited as to place, and as manifesting a purpose to prevent the manufacture and sale by the vendor of any instruments which would serve the same purpose as those made and sold by the corporation, and thus enable it more completely to control the market.

SUIT in equity against Moses G. Crane and Frederick W. Cole to enjoin any violation of a contract made between Cole and the plaintiff corporation. In the trial court the following decree was entered: "And now this case came on to be heard, and was argued by counsel, and thereupon, upon consideration thereof, the court doth find that the defendant Crane's acts in forming the Municipal Fire Alarm and Police Telegraph Company in connection with others, in subscribing and paying for stock therein, in acting as the treasurer and director thereof, and as a stockholder, officer, and director aiding such corporation in competition with the plaintiff, are in violation of his agreement with the plaintiff, whereof a copy is attached to the bill, and it is thereupon ordered, adjudged, and decreed that the defendant Crane be enjoined, during the period covered by the said agreement, from competing, directly or indirectly, as officer, member, or employee of any corporation, or in any other manner, with the plaintiff, and from aiding or assisting by counsel, advice, or otherwise any corporation, or any officer or member thereof, or any other person, in such competition; and that he be further enjoined from assigning any patent for any invention made by him, or any such invention, or any interest in any such patent or invention, relating to the apparatus in such agreement referred to, or any such patent or invention or interest therein of the kind described in the said agreement, except in accordance with the terms of the said agreement, and that the plaintiff recover its costs against the defendant Crane, and that as against the defendant Cole the plaintiff's bill be dismissed, with costs."

M. Storey and S. L. Powers, for the plaintiff.

J. Q. A. Brackett and S. J. Elder, for the defendants.

⁵¹ FIELD, C. J. The plaintiff company and the defendant Crane have each appealed from the decree of the superior court. The principal question is whether the following stipulation in the contract between the plaintiff and Crane is void. The stipulation is: "Said Crane further agrees not to engage in the business of manufacturing or selling fire alarm or police telegraph ⁵² machines and apparatus, and not to enter into competition with said Gamewell company, either directly or indirectly, for the period of ten years next ensuing after the date of this agreement." Crane had been a manufacturer of fire alarm and police telegraph apparatus

from the year 1856 to 1886, when the contract was entered into which is the subject of this suit. From the year 1879 to January, 1891, he was a director of the plaintiff company. In 1881 he, or the firm of which he was a member, entered into a contract with the plaintiff company to do all of its manufacturing. He testified that the company "was to have the use of patents of mine for a term of ten years, and to give all its manufacturing to Moses G. Crane or Crane & Co., and they agreed not to compete with the Gamewell company during that time." This is the contract which was annulled by the contract in suit. By the contract in suit Crane sold and conveyed to the company all his machinery, tools, draw-cases, and other property used in, or connected with, his business of manufacturing for said company, including "stock supplies partly manufactured, and raw material of every kind in any way pertaining" to said business of manufacturing in his factory at Newton Highlands, in Massachusetts, and he agreed to transfer to said company exclusive rights under, and control of, all letters patent for fire alarm and police apparatus only owned or controlled, wholly or in part, by him, together with exclusive rights under, and control of, all improvements in said fire alarm and police apparatus only made by him up to the date of the contract, and he gave to said company the "first option to purchase or obtain exclusive control for fire alarm and police purposes only, under any and all letters patent, improvements applicable to such apparatus which may be made by said Crane during the term of ten years next ensuing after the date of this agreement," etc. The consideration to be paid was thirty thousand dollars in cash and notes, and in addition to this such unwrought stock, machinery, etc., as was on hand at the date of the transfer, and was not included in the schedule attached to the contract, was to be paid for, at the "cost price, to be fixed by appraisal." Crane also agreed to let his factory to the company at a reasonable rent, if the company desired to hire it. The company actually paid Crane about forty-seven thousand ⁵³ dollars, as the consideration of the contract and the property conveyed.

The plaintiff contends that the agreement "not to engage in the business of manufacturing or selling fire alarm or police telegraph machines and apparatus, and not to enter into competition with said Gamewell company, either directly or indirectly, for the period of ten years," etc., is not void as being in restraint of trade: 1. Because it is an agreement

pertaining to "property and business protected by patents"; 2. Because the restraint is only co-extensive with the business sold, and is necessary to enable the company to enjoy fully what it has bought and paid for; and 3. Because it relates to a single commodity not of prime necessity, and not a staple of commerce: See *Central Shade Roller Co. v. Cushman*, 143 Mass. 353; *Morse Twist Drill etc. Co. v. Morse*, 103 Mass. 73; 4 Am. Rep. 513; *Gloucester Isinglass and Glue Co. v. Russia Cement Co.*, 154 Mass. 92; 26 Am. St. Rep. 214.

There seems to be no reason why the defendant Crane should not assign the patents and inventions which he agreed to assign, if there are any, and no serious objection has been raised by the defendant on this part of the case. The defendant contends that he has a right to assist in forming a corporation, and to act as one of its officers, the business of which is to manufacture and sell fire alarm and police telegraph machines, which are not made under any patents owned by the plaintiff, or under any patents which he has agreed to assign to the plaintiff, or which the plaintiff has elected to purchase under the option given in the contract, even although by so doing he enters into competition with the plaintiff in its business. He, in effect, concedes that, so far as the business is protected by patents which he has assigned or agreed to assign, the restraint is valid. It appears that there are "a dozen or fifteen concerns in the United States engaged in a somewhat similar business." The defendant testified that he looked up the number of patents pertaining to this branch of the art in 1881, and that there were then about five hundred. The defendant contends that he ought to be able to use his own patents for subsequent improvements applicable to such apparatus if the plaintiff does not elect to purchase them; that he was previously a manufacturer of fire alarm and police telegraph apparatus, and not a seller thereof; that the goodwill which ⁵⁴ attached to his business was that of a manufacturer who did not sell his manufactures in the market; and that it is against public policy that he should be restrained from exercising his peculiar skill any where in the United States, or in the world, for the period of ten years. The apparatus, as the defendant contends, which he has a right to manufacture and sell, is not secret machinery, and is not protected by any patents which the plaintiff owns or has a right to control, but is apparatus either not protected by

patents at all, or by patents of his own, or of other persons who may choose to employ the defendant.

The only ground, then, on which this restriction can be maintained is that it is reasonably necessary for the beneficial enjoyment by the plaintiff of the property it bought of the defendant, or, if this is not so, that the law in modern times does not regard such an agreement as against public policy. So far as we are aware, in every modern case in this commonwealth, except one where a contract in restraint of trade has been held valid, the restriction has been limited as to space. In *Taylor v. Blanchard*, 13 Allen, 370, 90 Am. Dec. 203, the parties entered into a partnership for carrying on "the trade or business of manufacturing shoe-cutters," and it was provided that, "at whatever time the said copartnership shall be determined and ended," the defendant "shall not, nor will at any time or times hereafter, either alone or jointly with, or as agent for, any person or persons whomsoever, set up, exercise, or carry on the said trade or business of manufacturing and selling shoe-cutters, at any place within the aforesaid commonwealth of Massachusetts, and shall not nor will set up, make, or encourage any opposition to the said trade or business hereafter to be carried on" by the plaintiff. The manufacture of shoe-cutters was an art which could be carried on only by persons instructed in it, and the business was confined to the plaintiff and three other persons, but the court held the agreement void.

In *Bishop v. Palmer*, 146 Mass. 469, 4 Am. St. Rep. 339, the plaintiff, being engaged in the manufacture and sale of bed-quilts and comfortables, conveyed to the defendant his "entire business plant and enterprise as a manufacturer of and dealer in bed-quilts and comfortables," together with the goodwill of the business and all the machinery, implements, and utensils used by him in said business, and agreed "that for and during the period of five years ⁵⁵ from the date hereof, he will not, either directly or indirectly, in his own name or in the name of any other person or persons, continue in, carry on, or engage in the business of manufacturing or dealing in bed-quilts or comfortables, or of any business of which that may form any part." It was held that this was clearly illegal and void as being in restraint of trade, because not limited as to space: See, also, *Pierce v. Fuller*, 8 Mass. 223, 226; 5 Am. Dec. 102; *Perkins v. Lyman*, 9 Mass. 522; *Stearns v. Barrett*, 1 Pick. 443; 11 Am. Dec. 223; *Palmer v. Stebbins*, 3 Pick. 188;

15 Am. Dec. 204; *Alger v. Thacher*, 19 Pick. 51; 31 Am. Dec. 119; *Gilman v. Dwight*, 13 Gray, 356; 74 Am. Dec. 634; *Angier v. Webber*, 14 Allen, 211; 92 Am. Dec. 748; *Dean v. Emerson*, 102 Mass. 480; *Dwight v. Hamilton*, 113 Mass. 175; *Boutelle v. Smith*, 116 Mass. 111; *Ropes v. Upton*, 125 Mass. 258; *Handforth v. Jackson*, 150 Mass. 149.

The case of *Morse Twist Drill etc. Co. v. Morse*, 103 Mass. 73, 4 Am. Rep. 513, is the case referred to as an exception. The question arose upon demurrer. The agreement of the defendant was not only to transfer his patents, machinery, etc., and all improvements and inventions, but "that he will use his best efforts for the perfecting of improvements in the business and manufacture, and for such alterations and combinations as may tend to insure the success of the same and of the company," and that he will "do no act that may injure the company or its business, and that he will at no time aid, assist, or encourage in any manner any competition against the same." He also agreed "to serve as the superintendent of the company for three years," etc. The plaintiff company was formed by the defendant and others, and the defendant's business was transferred to it; he was a stockholder, and was made superintendent. The plaintiff agreed to employ the defendant for three years, and he was actually employed as superintendent up to the time he entered upon a competing business. The case seems to have been decided on the ground that the defendant had agreed to give to the plaintiff his exclusive services with reference to his mechanical skill and ingenuity in all improvements, alterations, and combinations which would tend to insure the success of the plaintiff in manufacturing twist drills and collets. The court say that "the same principle that enables a partner to bind himself to do nothing in competition with the business of the firm ought to apply to him." The opinion proceeds to consider the English cases where the restriction was ⁵⁶ held not to extend beyond the goodwill of the business, which was the subject of the sale, or was not greater than the interests of the vendee required, and was not unreasonable in view of all the circumstances. This doctrine in England has been carried very far: See *Badische Anilin und Soda Fabrik v. Schott*, 3 Ch. Div. 447; *Mills v. Dunham*, 1 Ch. Div. 576; *Davies v. Davies*, L. R. 36 Ch. D. 359. In this country the courts generally have not gone so far, but the old law has been a good deal modified in some jurisdictions in view of modern

methods of doing business: See *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64; *Fowle v. Park*, 131 U. S. 88; *Ellerman v. Chicago Junction etc. Co.*, 49 N. J. Eq. 217; *Western Woodenware Assn. v. Starkey*, 84 Mich. 76; 22 Am. St. Rep. 686; *Matthews v. Associated Press*, 136 N. Y. 333; 32 Am. St. Rep. 741; *Oliver v. Gilmore*, 52 Fed. Rep. 562; *Diamond Match Co. v. Roeber*, 106 N. Y. 473; 60 Am. Rep. 464; *Whitney v. Slayton*, 40 Me. 224.

In the present case the plaintiff did not buy the goodwill of a mercantile business, and the defendant Crane had no customers for fire alarm and police telegraph machines and apparatus. The plaintiff gets every thing it bought if it gets the tangible property and the letters patent, and the improvements which the defendant Crane agreed to convey. The stipulation that Crane will not for ten years manufacture or sell fire alarm or police telegraph machines and apparatus, although under patents in which the plaintiff has no interest, or under patents which it has refused to buy, or under no patent at all, will tend to give the plaintiff a monopoly of the business. To exclude a person from manufacturing or selling, any where in the United States or in the world, machinery designed for certain purposes, in which that person has acquired great skill, may operate to impair his means of earning a living.

The stipulation seems to us to be some thing more than is reasonably necessary to protect the plaintiff in the enjoyment of the property it bought, even if that should be adopted as the test, upon which we express no opinion. The principal object of the stipulation was, we think, to prevent the manufacture or sale by the defendant of any instruments which would serve the same purpose as those made and sold by the plaintiff, and thus to enable the plaintiff more completely to control the market. ⁵⁷ Large cities and towns cannot well do without some kind of fire alarm and police telegraph apparatus, and it is an article of necessity for such municipalities. We are of opinion that under our decisions the stipulation must be pronounced void as against public policy. If there is to be a change in the law, as heretofore many times declared by this court, we think it is for the legislature to make it: See *Pacific Factor Co. v. Adler*, 90 Cal. 110; 25 Am. St. Rep. 102; *Taylor v. Saurman*, 110 Pa. St. 3; *Richardson v. Buhl*, 77 Mich. 632; *Herreshoff v. Boutineau*, 17 R. I. 3; 33 Am. St. Rep. 850; *Strait v. National Harrow Co.*, 18 N. Y.

Supp. 224; *Anderson v. Jett*, 89 Ky. 375; *Urmston v. Whitelegg*, 63 L. T., N. S., 455; *Perls v. Saalfeld*, 2 Ch. Div. 149.

For these reasons a majority of the court are of opinion that the decree against Crane should be substantially affirmed as to the assignment of patents and inventions, and as to costs, and should be reversed as to the rest. The decree in favor of Cole should be affirmed.

So ordered.

CONTRACTS IN RESTRAINT OF TRADE WITHOUT LIMITATION AS TO TERRITORY.—An agreement to restrain a party from pursuing his trade in any part of the country is void as against public policy: *Pike v. Thomas*, 4 Bibb. 486; 7 Am. Dec. 741, and note. A contract in restraint of trade must have reasonable limitation as to place: *Long v. Towl*, 42 Mo. 545; 97 Am. Dec. 355; *Bishop v. Palmer*, 146 Mass. 469; 4 Am. St. Rep. 339, and note; *Callahan v. Donnelly*, 45 Cal. 152; 13 Am. Rep. 172, and extended note; *Wiley v. Baumgartner*, 97 Ind. 66; 49 Am. Rep. 427. The cases and monographic notes in this series discussing this question will be found collected in the note to *Chapin v. Brown*, 32 Am. St. Rep. 301.

BERNARD v. TOPLITZ.

[160 MASSACHUSETTS, 162.]

MORTGAGE.—A SUIT TO REDEEM from a mortgage cannot be maintained unless the debt was due when suit was commenced, though it became due subsequently, and before the hearing of the cause.

PRACTICE IN EQUITY.—A SUPPLEMENTAL BILL may be filed, or a bill may be amended, by alleging matters occurring after the commencement of a suit, so as to present facts which will enlarge the extent, or change the kind, of relief, but not to aid an original bill prematurely filed, by asserting a cause of action which has become perfect since suit was brought, there being at that time no cause of action in favor of the complainant.

S. D. Warren and L. D. Brandeis, and J. E. Beeman, for the plaintiffs.

F. P. Goulding, for the defendant.

162 KNOWLTON, J. This is a suit by Henry O. Bernard and the H. O. Bernard Manufacturing Company, a corporation, to redeem an instrument in the nature of a mortgage, a copy of which is annexed to the plaintiff's bill. The money secured by the instrument was not payable until February 15, 1893, and the bill was filed on August 2, 1892. At the time of the hearing the plaintiffs were entitled to redeem, and the question is whether a decree for redemption can be entered in this

suit, or ¹⁶³ whether their right to redeem can be enforced only in a suit brought after it came into existence.

We are of opinion that this suit cannot be maintained. It is a general rule that the rights of parties in litigation are to be determined as of the time when the action was brought. The exceptions to this rule relate only to supplemental, incidental, or technical matters which are not of the substance of the plaintiffs' right. If the original bill is sustainable, a supplemental bill may be filed, or, under our practice, the bill may be amended by alleging matters occurring subsequently, so as to present facts which will enlarge the extent, or change the kind, of relief: 2 Daniell's Chancery Pleading and Practice, 3d Am. ed., 1594, and notes; *Candler v. Pettit*, 1 Paige, 168, 169; 19 Am. Dec. 399. So the appointment of an executor or an administrator, made while a suit in equity is pending, will relate back to the death of a testator or intestate: *Dearborn v. Mathes*, 128 Mass. 194; *Moses v. Levi*, 3 Younge & C. 359; *Humphreys v. Humphreys*, 3 P. Wms. 349. In suits by the vendor for specific performance, a decree may sometimes be entered for the plaintiff, although he was not able to furnish a good title until after the commencement of the suit: *National Webster Bank v. Eldridge*, 115 Mass. 424, 428; *Wynn v. Morgan*, 7 Ves. 202; *Reformed etc. Dutch Church v. Mott*, 7 Paige, 77, 84, 85; 32 Am. Dec. 613. But in these cases the time when the deed should be delivered is not of the essence of the contract, and the controversy relates to other matters.

In a suit brought for the redemption of a mortgage before the time for the performance of the condition, it is otherwise. If the condition is performed in accordance with the terms of the mortgage there is never any equity of redemption to be enforced by a suit, for the mortgage becomes void, and the title of the mortgagor becomes absolute by the contract itself. It has often been held that a suit for redemption of a mortgage cannot be maintained before the time for the performance of the condition, even though the mortgagor tenders performance of it before bringing his suit: *Brown v. Cole*, 14 Sim. 427; *Abbe v. Goodwin*, 7 Conn. 377; *Moore v. Cord*, 14 Wis. 213. That there is nothing, until a breach of the condition, on which to found a suit, is a good reason for the rule.

It is contended that this defense is not open, because the defendant ¹⁶⁴ did not set it up in his answer, and because the amendment of the answer was allowed, subject to equities arising from the facts reported. In the first place, it is at

least doubtful whether, under his original answer, the defendant would be precluded from relying on this defense. His admission of the allegations of the third paragraph of the bill was made subject to an exception, by which he referred to the original of the instrument for greater certainty, and the instrument shows that the debt had not become due. But if an amendment was needed, it was allowed after a hearing of facts offered by the plaintiffs to show that the contract in regard to the time for paying the money was different from that shown in the mortgage and a finding in favor of the defendant on that issue. The plaintiffs did not suggest that the original answer excluded this defense until after this hearing and a decision that the bill was prematurely brought. The presiding justice having allowed an amendment to the answer under these circumstances, we see no good reason why the defendant should not have the benefit of it.

Bill dismissed.

PLEADING—SUPPLEMENTAL BILL.—A supplemental pleading may introduce facts that have transpired since the suit commenced: *Nave v. Adams*, 107 Mo. 414; 28 Am. St. Rep. 421. A supplemental bill is proper when the original bill is sufficient to entitle the complainant to one kind of relief, and facts afterward occur giving him a right to other or more extensive relief: *Candler v. Pettit*, 1 Paige, 168; 19 Am. Dec. 399, and note. New averments to a bill in equity are properly alleged in a supplemental bill: *Dow v. Jewell*, 18 N. H. 340; 45 Am. Dec. 371, and note.

MORTGAGES.—REDEMPTION: See the extended note to *Horn v. Indianapolis Nat. Bank*, 21 Am. St. Rep. 245.

NIMS v. MOUNT HERMON BOYS' SCHOOL.

[160 MASSACHUSETTS, 177.]

CORPORATE WRONGS—ULTRA VIRES.—It is no defense to an action of tort to show that a corporation is not authorized by its charter to do wrong. If the corporation, by its officers or agents, unlawfully injures a person, whether intentionally or negligently, it cannot escape responsibility on the ground that its act is *ultra vires*.

CORPORATIONS—ULTRA VIRES.—If an educational corporation, not authorized by its charter so to do, undertakes to run a public ferry, and while running it accepts a passenger for hire, it is answerable to him in an action of tort for a neglect of its duty in the management of such ferry, by which he was injured.

CORPORATION—EVIDENCE SUFFICIENT TO SHOW ENGAGING IN UNAUTHORIZED BUSINESS.—If an educational corporation does not take any vote in regard to a ferry, nor take out any license to operate it, but there is a

bond filed conditioned that it will perform the duties of ferrymen, purporting to be executed in its behalf by a person named as its superintendent, and a ferry was operated under the direction of a student, who was also a trustee of the corporation, and receipts were turned over to its treasurer, and the person employed on the boat was paid by the paymaster of the corporation out of its funds, and another ferryboat was paid for by the same paymaster out of the same funds, and for six months such paymaster rendered monthly accounts to the treasurer of the corporation showing monthly receipts and expenditures on account of the ferry, these facts are sufficient to establish a ratification on the part of the corporation of the maintenance and operation of the ferry, and to render it answerable to any person received as a passenger thereon for hire, and injured by negligence in the management of the ferry.

PRINCIPAL AND AGENT.—THE RATIFICATION of an unauthorized act makes the principal liable in an action of tort for an injury resulting from the negligence of an agent in doing the act.

D. Malone, for the plaintiff.

C. C. Conant, for the defendant.

177 KNOWLTON, J. The defendant is an educational corporation. The plaintiff seeks to recover damages for an injury received through the negligence of a ferryman in managing a boat on which he was a passenger, and which, as he alleges, the defendant was using at a public ferry in the business of carrying passengers for hire. At the request of the defendant the presiding justice ruled that there was no evidence to warrant a finding for the plaintiff, and directed a verdict for the defendant. The defendant contends that the ruling should be sustained on one or both of two grounds. It says in the first place, that if it maintained the ferry, and hired and paid the ferryman, the business was *ultra vires*, and therefore it is not liable for negligence in the management of the boat. Secondly, it contends that there was no evidence to connect the corporation with the business of running the ferryboat, or to show that the ferryman was its servant.

It is a general rule that corporations are liable for their torts as natural persons are. It is no defense to an action for a tort to show that the corporation is not authorized by its charter to ¹⁷⁸ do wrong. Recovery may be had against corporations for assault and battery, for libel, and for malicious prosecution, as well as for torts resulting from negligent management of the corporate business: *Moore v. Fitchburg R. R. Corp.*, 4 Gray, 465; 64 Am. Dec. 83; *Reed v. Home Savings Bank*, 130 Mass. 443; 39 Am. Rep. 468; *Fogg*

v. *Boston etc. R. R. Co.*, 148 Mass. 513; 12 Am. St. Rep. 583; *Philadelphia etc. R. R. Co. v. Quigley*, 21 How. 202, 209; *Merchants' Bank v. State Bank*, 10 Wall. 604; *National Bank v. Graham*, 100 U. S. 699; *Gruber v. Washington etc. R. R. Co.*, 92 N. C. 1; *Hussey v. Norfolk Southern R. R. Co.*, 98 N. C. 34; 2 Am. St. Rep. 312. If a corporation, by its officers or agents, unlawfully injures a person, whether intentionally or negligently, it would be most unjust to allow it to escape responsibility on the ground that its act is *ultra vires*. The only plausible ground on which the defendant in the present case can contend that it should be exempt from liability for the negligence of its servant in managing the ferryboat is that the contract to carry the plaintiff was *ultra vires*, and therefore invalid, and that the duty for neglect of which the plaintiff sues arose out of the contract, and disappears with it when the contract appears to be void. The defendant may argue that the plaintiff cannot maintain an action for a breach of the contract to use proper care to carry him safely, and that he stands no better when he sues in tort for failure to do the duty which grew out of the contract.

In *Bissell v. Michigan etc. R. R. Co.*, 22 N. Y. 258, the plaintiff founded his action on the negligence of the two defendants while jointly running cars on a railroad in a state to which the charter of neither of them extended, and it was conceded that the defendants were acting *ultra vires*. The plaintiff recovered, Comstock, C. J., holding, in an elaborate opinion, that the corporations were liable under their contract, notwithstanding that the contract was *ultra vires*, and that if they could not be held under their contract they could not be held at all, inasmuch as the only negligence alleged was a failure to use the care which the contract called for. Selden, J., in an equally full and elaborate opinion, held that the contract for carriage was invalid, and that there could be no recovery under it, nor for negligence founded upon it; but it was his opinion that if the contract were set aside the ¹⁷⁹ defendants owed the plaintiff a duty founded on his relation to them as an occupant, with their permission, of a place in their car, and that the improper management of the car was a neglect of that duty for which the plaintiff could recover. Clerke, J., agreed with this view, and all but one of the other judges concurred in a decision for the plaintiff, without stating the ground on which they thought the decision should be placed. This case was followed in *Buffett v. Troy etc. R. R. Co.*,

40 N. Y. 168, in which it was held that a railroad corporation was liable for negligence of the driver of a stage-coach, which it was running without a legal right to do a business of that kind; but the opinion does not show whether the decision is founded on the opinion of Comstock, C. J., given in the former case, or on that of Selden, J. Like decisions have been made under similar facts in *Central R. R. etc. Co. v. Smith*, 76 Ala. 572; 52 Am. Rep. 353; *New York etc. Ry. Co. v. Haring*, 47 N. J. L. 137; 54 Am. Rep. 123; *Hutchinson v. Western etc. R. R. Co.*, 6 Heisk. 634.

The better doctrine seems to be that a contract made by a corporation in violation of its charter, or in excess of the powers granted to it, either expressly or by implication, is invalid, considered merely as a contract, and, so long as it is entirely executory, will not be enforced. It is not only a violation of a private trust, viewed in reference to the stockholders, but it is against the policy of the law, which intends that corporations deriving their powers solely from the legislature shall not pass beyond the limits of the field of activity in which they are permitted by their charter to work: *Monument Nat. Bank v. Globe Works*, 101 Mass. 57; 3 Am. Rep. 322; *Attorney General v. Tudor Ice Co.*, 104 Mass. 239; 6 Am. Rep. 227; *Davis v. Old Colony R. R. Co.*, 131 Mass. 258; 41 Am. Rep. 221; *Thomas v. Railroad Co.*, 101 U. S. 71; *Leslie v. Lorillard*, 110 N. Y. 519; *Linkauf v. Lombard*, 137 N. Y. 417; 33 Am. St. Rep. 743; *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*, 11 Com. B. 775, 803. On the other hand, courts have frequently held that, while such contracts, considered merely as contracts, are invalid, they involve no such element of moral or legal wrong as to forbid their enforcement if there has been such action under them as to work injustice if they are set aside. Courts have been astute to discover some thing in the nature of an equitable estoppel ¹⁸⁰ against one who, after entering into such a contract and inducing a change of condition by another party, attempts to avoid the contract by a plea of *ultra vires*. It is said that such a plea will not avail, when to allow it would work injustice and accomplish legal wrong: *Leslie v. Lorillard*, 110 N. Y. 519; *Linkauf v. Lombard*, 137 N. Y. 417, 423; 33 Am. St. Rep. 743. Many cases might be supposed in which it would be most unjust to hold that one who had received the benefits of such a contract might retain them, and leave the other party without remedy, as he might do in a supposable case, where

another had put himself at a disadvantage on the faith of a contract with him to commit a crime. Whether in this commonwealth a contract entered into by a corporation *ultra vires*, and partly performed, will ever be enforced on equitable grounds, we need not now decide: See *McCluer v. Manchester etc. R. R. Co.*, 13 Gray, 124; 74 Am. Dec, 624; *National Pemberton Bank v. Porter*, 125 Mass. 333; 28 Am. Rep. 235; *Attleborough Nat. Bank v. Rogers*, 125 Mass. 339; *Atlas Nat. Bank v. Savery*, 127 Mass. 75-77; 34 Am. Rep. 345; *Slater Woolen Co. v. Lamb*, 143 Mass. 420; *Prescott Nat. Bank v. Butler*, 157 Mass. 548; *National Bank v. Matthews*, 98 U. S. 621; *National Bank v. Whitney*, 103 U. S. 99; *Parish v. Wheeler*, 22 N. Y. 494; *Oil Creek etc. R. R. Co. v. Pennsylvania Trans. Co.*, 83 Pa. St. 160; *Bradley v. Ballard*, 55 Ill. 413; 8 Am. Rep. 656. In the present case we think it makes no difference that the defendant was not a manufacturing or trading corporation, but was chartered for educational purposes only. It could acquire and hold property, make contracts, and do any thing else incidental to the maintenance of the school. Doubtless some of its officers or agents thought it would be an advantage to its students and managers to have a public ferry at the place where the plaintiff was injured. Its maintenance of such a ferry was *ultra vires*, but its acts in that respect were not different in kind from the ordinary acts of corporations in excess of the powers given them by their charter. We are of opinion, therefore, that if the defendant while running the ferryboat accepted the plaintiff as a passenger to be transported for hire, and undertook to carry him across the river, he was in the boat as a licensee, it owed him the duty to use proper care to carry him safely, and, whether an action could be maintained for a breach of the contract or not, ¹⁸¹ it is liable to the plaintiff in an action of tort for neglect of that duty.

The other question in the case is whether there was evidence that the corporation operated the ferry. Under its by-laws the management of the corporation is vested in a board of trustees. It does not appear that any vote was ever taken in regard to the ferry, and it was not shown that any officer of the corporation took out the license which was granted to the defendant by the county commissioners, under Public Statutes, chapter 55, section 1, to keep the ferry; but the records of the county commissioners show that such a license was granted, and that a bond with sureties was given

to the county of Franklin, with the condition properly to perform the duty of a ferryman, executed in behalf of the defendant by one who was designated as superintendent, and witnessed by the defendant's cashier and paymaster. It further appeared that the title to the property used at the ferry was taken by Ambert G. Moody, one of the trustees of the defendant, who was then a student in Amherst College, and that he paid for it only a nominal sum above the mortgage existing upon it, and that he and the defendant's superintendent, who had charge of its farm, employed one Deane to operate the ferry, who was paid by the month, and who turned over the balance of the receipts of the ferry above his wages to the defendant's cashier and paymaster. For the month of April, Deane was paid for his services by the defendant's paymaster out of the defendant's funds. In June, 1890, a new ferryboat was constructed under an arrangement with Ambert G. Moody and Dwight L. Moody, both of whom were trustees of the corporation, and was paid for by the paymaster out of the funds of the corporation. For six months, and until there was a change in the management of the ferry, the defendant's cashier and paymaster sent to the treasurer, who lived in New York, monthly accounts, showing monthly receipts and expenses on account of the ferry. Accompanying the first of these accounts was a statement that the school was running the ferry and paying the bills. The treasurer was himself a trustee of the corporation. He subsequently rendered his official report to the corporation, which was audited by another of the trustees, who did not examine the items in person, but caused the examination to be ¹⁸² made by a man in his employment. This report was accepted by the trustees, and placed on file. The items of receipts and expenditures were entered on the books of the treasurer in an account under the title "Ferry." The treasurer's report was not put in evidence, and was not produced, although the defendant was notified to produce it.

There is no evidence of original authority from the defendant to anybody to operate the ferry on its account; but the evidence is plenary that persons connected with the management of its business assumed so to operate it. The important question is whether there was evidence that the corporation ratified the acts of these persons. We are of opinion that there was evidence from which the jury might have found such ratification. It is not necessary that the

ratification should be by a formal vote. It is enough if the corporation, acting through its managing officers, knowing that the business had been done by those who assumed to act as its agents in doing it, and that the income of the business had been received, and the expenses of it paid, by its treasurer in his official capacity, and that the balance of the receipts above the expenditures was in its treasury, adopted the action of its treasurer, and elected to keep the money. It was a fair inference of fact, especially when the corporation failed to produce the treasurer's report, after notice to produce it, that the report contained a true statement of the accounts which related to the ferry, and that it was accepted, with full knowledge, on the part of the trustees, of what it contained. Whether there was a ratification by the corporation was a question of fact for the jury on all the evidence.

If there was such a ratification, it carried with it the consequences which would have followed an original authority. In *Dempsey v. Chambers*, 154 Mass. 330, 26 Am. St. Rep. 249, it was held, after much consideration, that ratification of an unauthorized act would make the principal liable in an action of tort for an injury resulting from negligence of the agent in doing the act.

We are of opinion that the case should have been submitted to the jury.

Exceptions sustained. —

CORPORATIONS—LIABILITY FOR TORTS.—ULTRA VIRES AS A DEFENSE: See the extended note to *Central R. R. etc. Co. v. Smith*, 52 Am. Rep. 358-360. A corporation is liable for torts and wrongs committed *ultra vires*, outside and beyond the purpose of its creation, and within the scope of its powers and authority: *Hussey v. Norfolk etc. R. R. Co.*, 98 N. C. 34; 2 Am. St. Rep. 312, and note. See, also, the extended note to *Orlando v. Pragg*, 34 Am. St. Rep. 25, where this question is discussed with regard to municipal corporations, and, incidentally, with regard to private corporations.

AGENCY—EFFECT OF RATIFICATION OF AGENT'S TORTS.—A principal incurs liability, in tort as well as in contract, by ratifying the acts of his agent: *Morehouse v. Northrop*, 33 Conn. 380; 89 Am. Dec. 211, and note. In *Gulf etc. Ry. Co. v. Reed*, 80 Tex. 362, 26 Am. St. Rep. 749, and note, a discussion as to the effect of the ratification of the torts of servants will be found.

HAYES v. ALLEN.

[160 MASSACHUSETTS, 285.]

PAYMENT, WHAT IS NOT.—An agreement that defendant would sell and plaintiff buy certain property, and that a promissory note theretofore given by defendant to plaintiff should be received in part payment of the purchase price, does not, though such property is tendered to plaintiff, constitute a payment of such note, and, therefore, is no defense to an action thereon. Such agreement is not itself a satisfaction of the note, nor is it a new contract substituted for, and entitling defendant to, the note.

B. C. Moulton, for the defendant.

W. A. Hayes, for the plaintiff.

²⁸⁶ **MORTON, J.** The note in question was made for a valid consideration. The defense is, that subsequent to the making and delivery of it an oral agreement was made between the parties that the defendant would sell, and the plaintiff would buy, on the 1st of January next ensuing, three thousand shares of the capital ²⁸⁷ stock of the Antique Marble Company, at one dollar per share, and that the note should be taken as payment *pro tanto* for said shares. The stock was seasonably tendered by the defendant, and the note and the balance of the purchase money were demanded, but the plaintiff refused to give up the note and perform the contract. It is evident that the agreement in regard to the stock was an independent agreement. It was to be performed at a different time from that contained in the note, and the measure of damages for a failure to perform it would be different from that in case of failure to pay the note. It was not itself a satisfaction of the note, nor a new contract substituted for the note and entitling the defendant to it. Independent contracts of the nature of that set up in defense in this suit do not come within the principle which allows parties, in order to prevent circuitry of action, to avail themselves, by way of defense, in certain cases of matters which might be the subject of a suit: *Gibson v. Gibson*, 15 Mass. 106, 112; 8 Am. Dec. 94; *Waterhouse v. Kendall*, 11 Cush. 128; *Traver v. Stevens*, 11 Cush. 167; *Stanton v. Maynard*, 7 Allen, 335; *Bartlett v. Farrington*, 120 Mass. 284; *Hunt v. Brown*, 146 Mass. 253. The defendant does not claim that he can avail himself of the agreement by way of setoff. The case is not like that of *First Nat. Bank v. Watkins*, 154 Mass. 385, where the court held that the agreement operated at once, and in effect discharged the

defendant from liability on the note. In this case the agreement, which was executory, was that the note should be taken in payment *pro tanto*, and therefore recognized its continued existence.

Exceptions overruled. —

PAYMENT IN LAND.—The transfer of property by a debtor to his creditor cannot be regarded as in payment of the debt, or any portion of it, when there is no express agreement that it shall be accepted in payment, or fixing its value, nor can the intention on the part of the debtor that the property shall be accepted in payment of his debt operate to discharge it, if his purpose was neither assented to, nor known to the creditor: *Borland v. Nevada Bank*, 99 Cal. 89; 37 Am. St. Rep. 32. A deed of land from a debtor to his creditor will operate as a payment to the extent of the land, though there was no agreed price for the land: *Buffum v. Green*, 5 N. H. 71; 20 Am. Dec. 562. The law requires payment in money, and nothing else answers the purpose, unless accepted by the creditor or his duly authorized agent: *State Bank v. Byrne*, 97 Mich. 178; 37 Am. St. Rep. 332, and note, with the cases collected.

SHEA v. MASSACHUSETTS BENEFIT ASSOCIATION.

[160 MASSACHUSETTS, 289.]

BENEFICIAL ASSOCIATIONS.—THE DESIGNATION AS A BENEFICIARY OF ONE NOT COMPETENT to be such does not destroy a contract by which a beneficial association agrees to pay a certain sum to such improper beneficiary, and in the event of her death before that of the member upon whose life the beneficial certificate has been issued, that payment shall be made to his heirs. An action, therefore, may be maintained by his administrator for the benefit of his heirs at law.

BENEFICIAL ASSOCIATIONS.—THE FACT THAT A BENEFICIAL CERTIFICATE WAS ISSUED PAYABLE on the death of A. B. for the benefit of his daughter-in-law, and that all the premiums were paid by her, she not being within the class of persons who may be beneficiaries, does not prove that the contract was void as a wagering contract, if the other evidence tends to show that the certificate was obtained in good faith, and not for the purpose of speculating on the hazard of a life in which she had no legal interest.

BENEFICIAL ASSOCIATIONS MUST ASSUME THE BURDEN OF PROVING that a mortuary assessment, for nonpayment of which it seeks to avoid its liability, was duly authorized, and that proper notice thereof was given.

BENEFICIAL ASSOCIATIONS.—AN ESTOPPEL TO DENY THE VALIDITY OF A MORTUARY ASSESSMENT does not arise from its payment, unless the association accepts such payment without question. If it chooses to deny that the payment was valid and effectual, the party making it may, on his part, deny that it was due, and impose on the association the burden of proving the validity of the assessment.

A BENEFICIAL ASSOCIATION RECEIVING AND RETAINING MONEY OFFERED IN PAYMENT OF AN ASSESSMENT thereby waives any objection growing

out of delay in such payment. It cannot retain the money on some condition created by its officers or agents, and not communicated to the payor, and then upon his subsequent death escape liability because of such condition, and the noncompliance therewith.

BENEFICIAL ASSOCIATIONS.—NOTICE OF A CONDITION imposed on receiving moneys tendered in payment of a mortuary assessment is not sufficient to avoid such payment, unless notice is actually brought home to the payor, and that it was so brought home is not necessarily inferable from the fact that it was mailed to his address.

E. Avery and F. E. Litchfield, for the defendant.

J. B. Carroll, for the plaintiff.

290 ALLEN, J. The defendant contends that the action should have been brought in the name of Margaret B. Shea, the beneficiary. She was the daughter-in-law of John Shea, and, as both parties contend, was not within the classes of persons who may be beneficiaries. The designation of her as beneficiary was, therefore, invalid, and she could not maintain an action: Stats. 1882, c. 195, sec. 1. Such invalid designation, however, does not destroy the contract, which provides that, if Margaret should not be living at John Shea's death, then the payment should be made to **291** his heirs at law. The executrix may maintain the action for their benefit: *Rindge v. New England etc. Aid Society*, 146 Mass. 286; *Burns v. Grand Lodge United Workmen*, 153 Mass. 173.

It is, however, further contended that Margaret had no insurable interest in the life of John Shea, that all the premiums were paid by her, and that the contract was void as a wagering contract. This ground of defense was not open, not being set up in the answer: *Forbes v. American Ins. Co.*, 15 Gray, 249; 77 Am. Dec. 360. But apart from that, the facts stated were far from showing conclusively that a mere wager was intended, and the presiding justice rightly refused so to rule. The relationship in which Margaret stood to John, and the matters disclosed in her testimony, tended strongly to show that the policy or certificate of membership was obtained in good faith, and not for the mere purpose of speculating on the hazard of a life in which she had no interest; and if so, the contract was valid if made with him, though made for her benefit, and though the premiums were paid by her: *Campbell v. New England etc. Ins. Co.*, 98 Mass. 381; *Loomis v. Eagle etc. Ins. Co.*, 6 Gray, 396; *Forbes v. American Ins. Co.*, 15 Gray, 249; 77 Am. Dec. 360; *Cunningham v. Smith*, 70 Pa. St. 450; *Connecticut etc. Ins. Co. v. Schaefer*, 94 U. S. 457;

Ætna Life Ins. Co. v. France, 94 U. S. 561. See, also, *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24; 52 Am. Rep. 245. Moreover, it is to be observed that her testimony does not show that it was understood that she alone was to pay the premiums. She said that John Shea promised assistance in paying them, if necessary. The fact that she paid them, under the circumstances, was immaterial: *Ætna Life Ins. Co. v. France*, 94 U. S. 561.

The ruling that the burden was on the defendant to show that mortuary call No. 71 was properly and legally made, was right. The defendant in its answer set up that on March 31, 1892, a duly authorized assessment was called by said association, a notice of which was mailed to John Shea on said date, payable in thirty days hereafter; that said assessment was not paid within said thirty days, and thereupon the policy or certificate lapsed and became void. In order to establish a forfeiture of his membership, the first step was to show a duly authorized assessment, and the second, to show that it was not duly paid. The facts relating to the validity of the assessment were peculiarly within the defendant's knowledge. Unless, therefore, the plaintiff was ²⁹³ in some way debarred from questioning the validity of the assessment, the burden of establishing its validity clearly rested on the defendant; and upon the testimony of Litchfield, the defendant's secretary and assistant treasurer, as to the mode of issuing mortuary calls, it is not apparent how the call in question conformed to the rules annexed to Shea's policy or certificate of membership, which provided that he should not be liable for any sum in each year beyond the annual assessment of five dollars, except that upon the death of any member he should pay, if required, an additional assessment of seven dollars and fifty cents. It is not, however, necessary to dwell upon this, because the question was left to the jury, with instructions which were sufficiently favorable to the defendant.

²⁹³ The defendant, however, asked a ruling that, by making payment of the assessment, all parties in interest are estopped to deny that the assessment was legally made. This view would, perhaps, be reasonable, provided the defendant had accepted the payment without question. But the defendant undertook to impose a condition that the payment should be null and void unless John Shea was at the time in good health, and now contends that the payment was no payment, because he was not in good health. The position of the defendant is,

that the payment was sufficient to operate as a waiver by the assured of the invalidity of the assessment, but not sufficient to keep the policy in force. The payment would create no estoppel to deny the validity of the assessment, unless it was accepted as a valid payment. If repudiated, the assured would be as much at liberty to question the validity of the assessment as if no attempt to pay had been made. No estoppel would arise from a repudiated offer to pay, because the defendant did not act on the offer or change its position, and therefore it was not at liberty to set up an estoppel. No other ground of estoppel was urged or ruled on, except merely the effect of the payment, under the circumstances stated, and our decision is limited to that ground.

The defendant further contends that the policy lapsed by reason of the failure to pay the assessment in due time; that the subsequent receipt of the money was only conditional, and that the forfeiture of the policy was not thereby waived. One of the defendant's officers testified that the money for call No. 71 was received April 8th, which was too late, and that a receipt was thereupon mailed to Shea's address, expressing that the payment was received upon the condition hereinbefore mentioned, and not otherwise. There was some evidence tending to show that this receipt failed to reach Shea, or any one acting in his behalf. It thus became material to consider the rights of the parties, provided such a receipt was posted by the defendant, but failed to ²⁹⁴ reach its proper destination; and the defendant asked a ruling that, if such a receipt was mailed, and Shea was not in good health, the plaintiff could not recover. The court declined so to rule, and instructed the jury that the defendant must satisfy the jury that the receipt actually came to hand. The presumption that a letter duly posted reaches its proper destination was fully stated; but such presumption being rebuttable, it was left to the jury to determine, as a fact, whether the receipt in this case reached its destination.

It was not in dispute that the defendant received and kept the money sent for this call; and, ordinarily, an acceptance of the money, though it was paid after the expiration of the time fixed, implies a waiver of objection growing out of the delay: *Hodsdon v. Guardian Life Ins. Co.*, 97 Mass. 144; 93 Am. Dec. 73; *Insurance Co. v. Wolff*, 95 U. S. 326; *Phoenix Life Ins. Co. v. Raddin*, 120 U. S. 183, 196; *Wing v. Harvey*, 5 De Gex, M. & G. 265, 270. The money was tendered uncon-

ditionally; and if the company should retain it without objection, it would be held to assent to the terms of the payor. One who receives and retains money, which is sent to him to be kept on certain terms, must be deemed to assent to those terms if he keeps the money, unless he makes it known to the sender that he will only keep the money on some other and different terms; and if he seeks to establish different terms while keeping the money, it rests upon him to make that fact known. If the defendant would establish different terms from those upon which the money was sent, it must do some thing to make it known that its acceptance and retention of the money were conditional. It could not impose a condition binding upon Shea merely by determining in its own mind to do so. A secret vote of the directors that they would keep the money, but that the payment should be deemed valid only in case Shea was then in good health, would be of no avail. An uncommunicated condition is no condition. The company must certainly take some step to inform Shea, or his agents, that the money, though retained, would not be held upon the terms upon which it was sent. This duty arose from its actual retention of the money, which was sent on specified terms. To keep the money and insist on different uncommunicated terms would savor of fraud. Good faith required that the defendant should not remain passive, but ²⁹⁵ should do some thing if it objected to the payments being considered unconditional. But, then, how much was it incumbent on the defendant to do? Must it be held to bring notice home to Shea, or his agents, or was its duty satisfied by merely posting its communication in the mail? There is nothing in the policy, or in the rules of the company annexed thereto, or in the by-laws, providing that such an effect shall be given to mailing a communication of this character. No fact is stated from which a request can be implied or inferred from Shea that the company should communicate such a condition in that way. In the absence of any stipulation in the contract between the parties, or in the rules of the company, or of any express or implied request on the part of Shea, or his agents, or those acting for him, we are acquainted with no rule of law under which he can be held to be bound by the defendant's act of imposing a condition upon its acceptance and retention of the money, unless notice of such condition is actually brought home to him, or to those acting for him.

There is some analogy between this case and the ordinary case where one is under a duty to make a payment of money. If he uses the mail for that purpose, without express or implied authority, he must take the risk of the payment reaching its proper destination: *Gurney v. Howe*, 9 Gray, 404; 69 Am. Dec. 299; *Crane v. Pratt*, 12 Gray, 348. So, ordinarily, when a demand must be made or notice given, merely posting the demand or notice in the mail would not be a communication to the person addressed, and would be ineffectual, unless the same should be received: *Castner v. Farmers' etc. Ins. Co.*, 50 Mich. 273, 277; *Leake on Contracts*, 21-24. There has been much discussion as to the time when the acceptance of a contract by letter takes effect, and it is now considered by courts in England that the ground for holding that such acceptance takes effect from the posting of the letter is because that mode of accepting is to be deemed to have been authorized by the other party to the contract, either expressly or by implication; and that the doctrine establishing the acceptance as effectual from that time is limited to cases where acceptance by post is expressly or impliedly authorized: *Household etc. Ins. Co. v. Grant*, 4 Ex. Div. 216, 218, 228; *Byrne v. Van Tienhoven*, 5 Com. P. Div. 344, 348; *Stevenson v. McLean*, 5 Q. B. Div. 347; *Leake on Contracts*, 24.

²⁹⁶ In the present case it is impossible to say that Shea or those acting for him assented in advance that the defendant, in case of its desiring to qualify its acceptance of the money by a condition, might communicate such condition merely by posting it in the mail. The check was collected in due course, and its final payment and return to the drawer afforded a voucher for the payment to the defendant. Those acting for Shea were aware that the money was retained by the defendant, and, if the conditional receipt miscarried in the mail, or for any reason did not come to their hands, no communication of the condition was made to them; and if so, the effect of the retention of the money by the defendant was to waive the forfeiture.

We do not know the ground on which the jury proceeded in rendering their verdict for the plaintiff. It may have been either on the ground that call No. 71 was not shown to have been valid, or, if the call was valid, that no notice was given to Shea or those who acted for him that the defendant would not accept the payment except upon condition. We have

only to do with the questions of law presented to us, as separate propositions. Finding no error in the rulings upon these, the entry must be, exceptions overruled.

LIFE INSURANCE—DESIGNATING BENEFICIARY.—An assignment of a valid policy to one having no insurable interest in the life insured, or the naming of such a one in the policy as the beneficiary, does not invalidate it: *Equitable Life Ins. Co. v. Hazlewood*, 75 Tex. 338; 16 Am. St. Rep. 893, and extended note discussing the subject at length.

MUTUAL BENEFIT SOCIETY—BURDEN OF PROOF AS TO VALIDITY OF ASSESSMENT.—When a mutual benefit society relies upon the failure of any member to pay his assessment as a forfeiture of his membership it must show affirmatively that the assessment was made in the mode pointed out in the charter, otherwise the member will not be in default: *American Mut. Aid Soc. v. Hellburn*, 85 Ky. 1; 7 Am. St. Rep. 571.

LIFE INSURANCE—WAIVER OF FORFEITURE BY RECEIVING OVERDUE PREMIUM.—The acceptance by an insurance company of an overdue premium is a waiver of the condition of forfeiture for nonpayment of a premium when due: *Mutual Ben. etc. Co. v. Robertson*, 59 Ill. 123; 14 Am. Rep. 8; *Stylow v. Wisconsin Odd Fellows etc. Ins. Co.*, 69 Wis. 224; 2 Am. St. Rep. 738, and note. See, also, the note to *Continental etc. Ins. Co. v. Yung*, 3 Am. St. Rep. 637.

UGGLA v. WEST END STREET RAILWAY COMPANY.

[160 MASSACHUSETTS, 351.]

NEGLIGENCE—PRESUMPTION OF FROM ACCIDENT.—If a person driving in a public street is struck by a broken iron, part of an ear used to clasp a trolley wire and apply to it a strain from the guy, in order to keep the trolley wire in place around a curve and over a track, these facts, in the absence of other evidence, justify and require the jury to find negligence on the part of the defendant. If, however, defendant offers evidence tending to show due care on its part in the selection and inspection of its apparatus, then it is for the jury to determine from all the evidence whether defendant was negligent or not.

NEGLIGENCE—DEGREE OF CARE REQUIRED.—In an action founded upon alleged negligence it is proper to instruct the jury that, in determining the question, they should take into consideration, as one of the most important facts, the apparent danger—what would happen if there was a failure to use proper care, and if there was a danger of causing loss of life or of great serious bodily injury to persons traveling upon the street, they might properly say that reasonable care would be a high degree of care, because it would be the degree of care commensurate with the apparent danger.

M. F. Dickinson, Jr., and W. B. Sprout, for the defendant.

J. D. Long and C. E. Todd, for the plaintiff.

353 BARKER, J. The plaintiff, while driving on Park square, in Boston, was struck by a broken iron attached to a

wire guy. The iron was part of an ear, used to clasp a trolley wire and apply to it a strain from the guy, in order to keep the trolley wire in place around a curve and over the defendant's track. The ear broke with the strain, and one part of it fell, striking the plaintiff on his head. As to these facts, there was no dispute at the trial, and there was no other evidence that the defendant was in fault. There was, however, other evidence, introduced by the defendant, that it was not guilty of negligence, tending to show that the break was a clean break, bright in color and appearance, and that the iron was sound all through, with no flaw or defect in it, and also that the whole apparatus was manufactured and put up by a manufacturer of the highest reputation; that the ear and guy constituted the best and strongest device known at the time for keeping trolley wires in place; that the defendant employed a corps of competent superintendents, foremen, and inspectors, who inspected the whole line weekly, including the ears and their attachments; and that this particular part of the line had been inspected within a week prior to the accident.

353 The exceptions taken were to certain portions of the charge to the jury, which the defendant contends were wrong in two respects; first, as to the weight which the jury should give to the happening of the accident itself as evidence of the defendant's negligence, and next, because the charge held the defendant to too high a degree of care.

1. The part of the charge which the defendant contends is objectionable on the first ground is the sentence in which the presiding justice, after having recited the manner in which, as was conceded, the accident occurred, and having said that if nothing further appeared it would be competent for the jury to find negligence on the part of the defendant, further said: "The plaintiff must prove negligence, but when he proves the facts to which I have called your attention, and nothing else appears in the case, a jury may well find, and should find, negligence on the part of the defendant corporation." In our opinion, this was a correct statement of the law. No one but the defendant was responsible for the safety of its apparatus, and from the circumstances of the accident it would not be reasonable to infer that it was due to the careless or willful act of any third person, or to any cause except the failure of the apparatus to support the strain to which it was subjected in the use for which it was designed and which

was made of it by the defendant. If the defendant should offer no explanation of the breaking, and no evidence that it had taken pains to make the apparatus safe, the only proper inference would be that it had not taken reasonable care to make the apparatus safe, and the jury should find negligence on its part.

Aside from this, the charge was not open to exception because of the sentence quoted, for the reason that the sentence, other facts than those with which it dealt having been testified to, did not purport to give the rule which the jury were to apply to the question of the defendant's negligence, but was a preliminary statement calling the attention of the jury to the degree of weight and importance to be attached to certain admitted facts (see *Durant v. Burt*, 98 Mass. 161, 168), and the charge further clearly instructed them to consider the question of the defendant's negligence in the light of all the evidence in the case.

2. The charge was correct in its statement of what would be ³⁵⁴ reasonable care on the part of the defendant. The jury were instructed that in determining that question they should "take into consideration, as one of the most important things, the apparent danger—what would be likely to happen if there was a failure to use proper care. If the danger is a danger of causing the loss of life, causing death or serious bodily injury to persons traveling upon the street," they were told they might "properly say that reasonable care would be a high degree of care, because it would be the degree of care commensurate with the apparent danger." These instructions were in accordance with the rule often stated by this court, as in *Hutchinson v. Boston Gas Light Co.*, 122 Mass. 219, 222, "that the vigilance and attention required must conform to the nature of the emergency and the danger to which others may be exposed, and is always to be judged of according to the subject matter, the danger and force of the material under the defendant's charge."

Exceptions overruled.

NEGLECT—PRESUMPTION FROM HAPPENING OF ACCIDENT.—This question is fully discussed in the monographic note to *Philadelphia etc. R. R. Co. v. Anderson*, 20 Am. St. Rep. 490-495, and the note to *Fleming v. Pittsburgh etc. Rys.*, 38 Am. St. Rep. 838, where the latter cases in the series on the subject are collected.

NEGLECT—DEGREE OF CARE REQUIRED.—The degree of care to be used in any given case, to avoid the imputation of negligence, must be accord-

ing to the circumstances, or in proportion to the danger; *Jacksonville etc. Ry. Co. v. Peninsular Land etc. Co.*, 27 Fla. 1; *Ellis v. Lake Shore etc. R. R. Co.*, 138 Pa. St. 506; 21 Am. St. Rep. 914; *Houston etc. Ry. Co. v. Boozer*, 70 Tex. 530; 8 Am. St. Rep. 615; *Hays v. Gainsville etc. Ry. Co.*, 70 Tex. 602; 8 Am. St. Rep. 624; *Barrett v. Southern Pac. Co.*, 91 Cal. 296; 25 Am. St. Rep. 186, and note; *Baltimore etc. R. R. Co. v. Woodruff*, 4 Md. 242; 59 Am. Dec. 72; *Pennsylvania R. R. Co. v. Ogier*, 35 Pa. St. 60; 78 Am. Dec. 322, and note. What is due or reasonable care depends on the subject matter to which care is to be applied, and the attendant circumstances; *Davis v. Winslow*, 51 Me. 264; 81 Am. Dec. 573; *Butterfield v. Western R. R. Corp.*, 10 Allen, 532; 87 Am. Dec. 678, and note.

O'REGAN v. CUNARD STEAMSHIP COMPANY.

[160 MASSACHUSETTS, 356.]

CONFLICT OF LAWS—CONTRACT WITH COMMON CARRIER, WHERE DEEMED TO BE MADE, AND BY WHAT LAWS GOVERNED.—If, in consideration of a sum paid, a receipt is given in Massachusetts stating that it is for the steerage passage of a person named in the receipt, by any steamer of a line in which there may be room for transportation on this ticket from Queenstown to Boston, that to secure passage, a notice of intention to embark must be given, and that, if the passenger should decline coming, the money will be returned, less commissions, and if the intended passenger gives notice of her intention to embark, and, before taking passage, surrendered the paper given in Massachusetts, and received in place thereof a passenger's contract ticket stating the name of the vessel, the port of destination, the date of sailing, and giving the full details of the contract, including certain conditions exempting the carrier from liability for injuries, though received by the passenger from its negligence, this last ticket takes the place of the prior papers, and becomes the contract between the passenger and the carrier, and if the conditions of exemption from liability are valid in the place where the ticket was issued, then the passenger cannot recover for negligence, though such conditions were invalid by the law of the state where the money was paid and the original receipt therefor given.

CARRIERS—CONDITIONS IN TICKET.—One accepting a ticket from a carrier is bound by the conditions therein, though she did not and could not read it. It was her duty to ascertain its contents if she cared to know her rights.

CONFLICT OF LAWS.—A STIPULATION RELIEVING A CARRIER FROM LIABILITY FOR NEGLIGENCE, though against the policy of our law, is not immoral or illegal, and, if valid in another country where it was made, will be enforced by our courts.

TORT for personal injury to the plaintiff. In March, 1891, the plaintiff's daughter applied in Boston to an agent of the defendant for the purchase of a steerage passage ticket for the plaintiff from Queenstown to Boston, and there paid twenty dollars, the full price of such ticket, and received from the

agent two tickets, one of which contained the defendant's name, stated the receipt of the twenty dollars for the steerage passage of the person named on the margin, who was the present plaintiff, "by any steamer of this line in which there may be room after presentation of this ticket, and that to secure passage, the accompanying notice of intention to embark must be sent at least eight days in advance" to the company, and that "this ticket is subject to the conditions indorsed hereon." One of these conditions was that the company should not be "liable for loss of or injury to the passenger or his luggage, whether arising from negligence of the company's servants, whether on board the steamer or not." The other paper was a memorandum of a ticket issued by the agent for steerage passage by the defendant's line in favor of plaintiff, and stated, that "should the above passenger decline coming the money will be refunded, less agent's commission, on production of this memorandum and corresponding ticket." This latter paper was kept by the daughter, and the other forwarded to the plaintiff at Cork. The daughter also transmitted to plaintiff a notice of intention to embark, which had been given to the daughter by the agent at the time the passage ticket was purchased. In September the plaintiff went to the office of the defendant at Cork, and there presented the first-named paper and the notice of an intention to embark, and told the agent that she wished to take passage on September 25th. He thereupon took up these papers, and gave another paper in return therefor, and told her to call again on the following Wednesday. At that time she did call, and received in exchange for the paper last given another paper, with instructions to present it at the defendant's office in Queenstown. She did as thus instructed, and at the office in Queenstown received in exchange still another paper, containing the defendant's name on the heading, and also the words, "Passenger's Contract Ticket." This ticket recited the name of the steamship, the port of destination, the date of sailing, that the plaintiff should be provided with a steerage passage to, and shall be landed at, the port of Boston." It also contained full provisions respecting the board during the voyage, and recited that it was subject to the conditions set forth on the back thereof, which were the same as those indorsed on the first paper. This last paper or ticket was taken up by the defendant at the time it permitted the plaintiff to take passage at Queenstown. When the daughter purchased the passage,

her attention was not called to any of the conditions, and she did not read the paper nor know any of the conditions therein limiting the liability of the defendant. The plaintiff was not notified of any of the conditions otherwise than by their being printed on the ticket, and she did not and could not read the ticket. The only money paid in the transaction was that received by the defendant's agent in Boston. By the British law it is conceded that carriers of passengers may, by a special contract, exempt themselves from liability to injury to passengers resulting from the negligence of their servants, but the law of Massachusetts is otherwise. The trial judge ruled, as a matter of law, that the plaintiff was not entitled to recover, and directed a verdict for the defendant. The case was then presented to the appellate court that a judgment might be entered on this verdict if the ruling of the trial court was right, otherwise that a new trial might be ordered.

A. F. Hayden, for the plaintiff.

G. Putnam and T. Russell, for the defendant.

³⁵⁹ KNOWLTON, J. The plaintiff was sent for, and the price for her passage was paid by one of her daughters, a resident of Boston. It does not distinctly appear by the report whether the daughter, in paying for the passage, acted for herself or as an agent for the plaintiff, but the case has been argued by the plaintiff's counsel as if the plaintiff was the original contracting party acting through her daughter as her agent. It is a natural inference from the language of the report, that the daughter paid the money and made the contract in Boston as a principal, but for the benefit of her mother. Perhaps this is not very important, for if the defendant contracted with the daughter to carry the plaintiff it would owe the plaintiff the duty to use proper care for her safety as a passenger as well as if the contract were made with the plaintiff herself.

The first question in the case is whether the contract made in Boston, or the more definite agreement subsequently made in Cork, is the contract by which the rights of the parties are to be determined. The contract made in Boston was not an ³⁶⁰ agreement that the plaintiff should take passage, and that the defendant should carry her to Boston at all events. It gave an option to the plaintiff to be carried or not, as she might choose, and, if her decision should finally be adverse

to coming, it bound the defendant to pay back the money, less the agent's commission. It did not state when or by what steamer the plaintiff would come, or whether she would come at all, and it could not be known whether it would ever be the duty of the defendant to carry her until she should first determine whether she wished to come. As soon as she gave the notice of her intention to embark in accordance with the terms of the original contract she became entitled to a steerage passage on the next steamer sailing for Boston. If nothing else had occurred her rights would have been finally fixed by the contract made in Boston; but if the parties chose, it was proper for them to make a new and more definite contract, containing provisions in regard to what before had been left indefinite and uncertain. The giving of the notice of intention to embark, the assignment of the plaintiff to a particular steamer, and the giving up of the old contract by both parties, were a sufficient consideration for the making of the new one. If the plaintiff, through her daughter as agent, was the original contracting party at Boston it is very clear that she could consent to give up the old contract and substitute a new one for it. If the contract made in Boston was her daughter's contract, and not hers, it was of a kind which contemplated the use of it by her for her own benefit, as evidence of the ownership of a valuable right personal to herself. Through the original contract she was brought into the position of a person entitled to passage on the defendant's steamer. As a person holding a ticket entitling her to a steerage passage on some steamer of the defendant, it was competent for her, before becoming a passenger, in connection with the notification of intention to embark, to enter into a new and more definite arrangement with the defendant in regard, not only to the steamer on which she should come, but also to other things affecting her interests, and to give up her rights under the original paper, and to take a new contract stating more fully the rights and duties of the parties. As the holder of a personal ticket procured and paid for by her daughter, she could ³⁶¹ do this as well as if she had bought the ticket herself. Before the making of the new contract the plaintiff had no definite agreement with the defendant in regard to her board during the voyage, and the stipulations in regard to that, and other things, with the cancellation of the old ticket, furnished a valuable consideration for the substitution of a new one. After the new one was issued and

accepted the rights of the parties were governed by it. It was made in Great Britain, and it is governed by English law. It was not a mere check, but was a contract by which the plaintiff was bound, even if she did not read it. It was her duty to ascertain its contents, if she cared to know her rights: *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553; 25 Am. St. Rep. 660. Although the stipulation relieving the defendant from liability for injuries resulting from the negligence of its servants is against the policy of our law, it is not immoral or illegal, and it being valid in Great Britain, where it was made, it will be enforced on principles of comity by our courts: *Milliken v. Pratt*, 125 Mass. 374; 28 Am. Rep. 241; *Scudder v. Union Nat. Bank*, 91 U. S. 406; *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553; 25 Am. St. Rep. 660, and cases there cited.

If the rights of the parties had been left to stand on a contract made in Boston to transport thither a passenger from Queenstown, in Ireland, on a British ship, a question would have been involved which we have no occasion now to consider.

Judgment on the verdict. —

CONFLICT OF LAWS—CONTRACT WITH CARRIER, WHERE DEEMED MADE.—

A contract with a common carrier, made in New York, and to be performed there, releasing the carrier from responsibility for negligence, will be enforced in this state, and if no recovery can be had under such contract in New York, none can be had here: *Forepaugh v. Delaware etc. R. R. Co.*, 128 Pa. St. 217; 15 Am. St. Rep. 672. A person while riding on a railway on the state of New York on a ticket entitling him to passage between two stations situated in that state was injured on a portion of the road which passes through Pennsylvania. It was held that the contract was deemed made with reference to the laws of New York, and that a Pennsylvania statute limiting the amount of recovery in such cases could not affect the damages in that case: *Dyke v. Erie Ry. Co.*, 45 N. Y. 113; 6 Am. Rep. 43. One who purchased a railroad ticket from New York to Philadelphia, from a person who was not an authorized agent of the company, may maintain an action against the company for refusal to carry him, the sale being legal in New York, though forbidden, under penalty, in Philadelphia: *Sleeper v. Pennsylvania R. R. Co.*, 100 Pa. St. 259; 45 Am. Rep. 380. A contract made in England for the carriage of a passenger to the United States, though regarded by the laws of this state as against public policy, and void, will be enforced here, if not illegal nor immoral: *Fonseca v. Cunard S. S. Co.*, 153 Mass. 553; 25 Am. St. Rep. 660.

CARRIERS—TICKETS—BINDING EFFECT OF.—One who accepts a passenger contract ticket containing elaborate provisions regarding the rights of the passenger during carriage is bound by them, whether he reads them or not: *Fonseca v. Cunard S. S. Co.*, 153 Mass. 553; 25 Am. St. Rep. 660, and note; *Eddy v. Harris*, 78 Tex. 661; 22 Am. St. Rep. 88. The purchaser of

a railway passenger ticket does not bind himself to all of its terms by its mere acceptance, in the absence of actual knowledge of them, though he bought the ticket at a reduced rate, but at the rate usual to persons of the class of passengers to which he belonged: *Kent v. Baltimore etc. R. R. Co.*, 45 Ohio St. 284; 4 Am. St. Rep. 539, and note with the cases collected, See, further, the extended note to *Kansas City etc. R. R. Co. v. Rodebaugh*, 5 Am. St. Rep. 727.

SPRINGFIELD INSTITUTION FOR SAVINGS v. COPELAND.

[160 MASSACHUSETTS, 380.]

HUSBAND AND WIFE.—NO PRESUMPTION OF A GIFT FROM A WIFE TO HER HUSBAND ARISES from the fact that he deposited in a bank, in his own name, by her permission, her moneys, under circumstances indicating that they were deposited in this manner for convenience, until they could be invested for her benefit, or for that of her husband.

TRUSTEE AND BENEFICIARY.—FOLLOWING TRUST FUNDS.—Whether a disposition of trust funds be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, if he can identify them. If they cannot be identified, because they are mingled with the moneys of the trustee, then the beneficiary is entitled to a charge upon the new investment to the extent of the trust money traceable in it.

HUSBAND AND WIFE.—IF MONEYS ARE DEPOSITED IN A BANK IN THE NAME OF HUSBAND AND WIFE, subject to withdrawal by either, they belong to her on the death of her husband leaving her surviving.

HUSBAND AND WIFE.—IF PERMANENT SECURITIES PURCHASED WITH THE MONEYS of a wife are placed in the name of her husband with her assent, she will be presumed to have intended them to be his property; but shares of stock so purchased, and marked on the back with her initials, are presumed to belong to her estate.

H. C. Bliss, for Geraldine G. Strout.

A. M. Copeland, pro se.

380 FIELD, C. J. The first suit is a bill of interpleader to determine whether certain sums of money deposited with the Springfield Institution for Savings in the names of "S. J. and U. M. Goodenough, subject to withdrawal by either," amounting to \$976.96, with the interest thereon, belong to the estate 381 of Samuel J. Goodenough, or to the estate of Urania M. Goodenough, his wife.

The second suit is a bill in equity, by the administratrix, with the will annexed, of the estate of Mrs. Goodenough, against the administrator of the estate of Mr. Goodenough, to compel the transfer to the plaintiff of certain shares of stock and of certain bonds standing in the name of Mr. Goodenough, on the ground that they were purchased with the proceeds of the sale of securities belonging to Mrs. Goodenough.

The third suit is a bill in equity, by the administratrix, with the will annexed, of the estate of Mrs. Goodenough, against the administrator of the estate of Mr. Goodenough and the Springfield Five Cents Savings Bank, to compel the payment to the plaintiff of the sum of \$1,000, deposited in said savings bank in the names of "S. J. and Urania M. Goodenough, either to draw whole or part," with the interest thereon, on the ground that the money deposited was the property of Mrs. Goodenough.

The fourth suit is a bill in equity, by the administratrix, with the will annexed, of the estate of Mrs. Goodenough, against the administrator of the estate of Mr. Goodenough and the John Hancock National Bank, to compel an assignment to the plaintiff of the money standing to the credit of Mr. Goodenough on the books of the bank, or to compel the bank to pay the amount to the plaintiff, on the ground that the money, although deposited in the name of Mr. Goodenough, was the money of Mrs. Goodenough.

Mr. Goodenough died intestate on December 28, 1891, and his estate has been represented insolvent. Mrs. Goodenough died on January 20, 1892, leaving a will, which has been duly admitted to probate. The suits were sent to a master to find the facts, and have been reserved upon his report and an agreed statement of facts.

With the exception of \$100 deposited in the Springfield Institution for Savings on August 6, 1884, all the money deposited in both savings banks was drawn by Mr. Goodenough on February 18, 1890, from the deposit in the John Hancock National Bank. It is found that Mr. Goodenough "kept an account at said John Hancock National Bank, in his own name, from October, 1883, to the time of his death—December 28, 1891." On ³⁸² February 1, 1890, the balance to his credit in this bank was \$89.65; and on the morning of February 12, 1890, it was \$51.65. Afterwards, on the same day, he deposited in this bank \$15,093.62, which was the proceeds of a check payable to the order of Mrs. Goodenough, given to her in part payment of the legacy to her contained in the will of Noble Maxwell. On February 18, 1890, Mr. Goodenough also deposited in this bank \$360, which, on the finding of the master, must be taken to have been the proceeds of the sale of three shares of Sagadahock Bank stock belonging to Mrs. Goodenough. As we read the master's report and the agreed facts, there is no clear evidence that

any of the money deposited with this bank was ever the property of Mr. Goodenough. The greater part in number and amount of the deposits are shown to have been Mrs. Goodenough's property. It simply does not appear whether the other deposits came from his or her property. It is agreed that, from February 12, 1890, to the time of his death, he "owned no property of any amount, except his interest in the money and securities in these suits." It is found that there was deposited in this bank about \$31,000, between February 1, 1890, and the death of Mr. Goodenough, of which about \$24,500 "came from either the income or proceeds of sale of Mrs. Goodenough's property." It is agreed "that prior to February 12, 1890, said Goodenough had deposited in said bank several thousand dollars of money, which appears to have come from the legacy of Noble Maxwell; [and] there was no evidence that he had withdrawn any considerable part of the money, deposited as aforesaid for the use of Mrs. Goodenough, up to the time of his death."

The first question is, whether it should be inferred that Mrs. Goodenough intended to give to her husband all the moneys deposited in his name with the John Hancock National Bank. The master has found that, "apparently they were both conversant with, and approved of, the management of their respective financial affairs." Mrs. Goodenough kept no bank account in her own name. It appears that they jointly "hired a deposit box in the vault of the Springfield Safe Deposit and Trust Company, . . . each having a key thereto," and that in this box were kept the savings bank books, the certificates of stock, and other securities standing in the name of each.

353 If the law, as declared in *Marshall v. Jaquith*, 134 Mass. 138, be applicable to a gift by a wife of her separate property directly to her husband, upon which we express no opinion, the facts in the cases now before us do not show an effectual gift of the money deposited with the John Hancock National Bank, because the husband died before the wife: See *Porter v. Wakefield*, 146 Mass. 25; *Stimpson v. Achorn*, 158 Mass. 342. In *Jacobs v. Hesler*, 113 Mass. 157, it is said: "When a wife, with her own hand, pays money of her separate property to her husband there is no presumption that he receives it in trust for her, but the burden is on her to prove the fact. In the absence of such proof the money must be deemed to have been given to him with the intention that it should be applied

to the use or benefit of either or both of them, at his discretion": See *Clark v. Patterson*, 158 Mass. 388; 35 Am. St. Rep. 498. There are also cases in which the wife has mingled her separate property with that of her husband under such circumstances that she has been held to have lost it, or lost the right to recover it: *Kelly v. Drew*, 12 Allen, 107; 90 Am. Dec. 138; *McCluskey v. Provident Inst. for Savings*, 103 Mass. 300; *Bassett v. Bassett*, 112 Mass. 99; *Kneil v. Egleston*, 140 Mass. 202; *Woodward v. Spurr*, 141 Mass. 283.

We think, however, that the most reasonable inference from the facts found or agreed in the cases at bar is, that the wife intended neither to give nor to lend to her husband the money which he deposited in his own name in the John Hancock National Bank, but that she permitted it to be deposited in this manner for convenience until it should be invested, with the intention that it might be used for her own benefit or that of her husband. It is evident that the whole of the balance of \$748.94, standing to the credit of Mr. Goodenough on the books of the John Hancock National Bank, together with what has heretofore been expended for the use of Mrs. Goodenough, including the deposits in the savings banks, will not make up the amount of her money which is shown to have been deposited in that bank, and that, so far as appears, all the money which remains in that bank is her money, unless she has effectually given it to him.

The principles which govern a case of this kind are considered in *In re Hallett's Estate*, L. R. 13 Ch. D. 696, and in ³⁸⁴ *National Bank v. Insurance Co.*, 104 U. S. 54. In the latter case, it is said in the opinion that the modern doctrine of equity, as regards property disposed of by persons in a fiduciary position, is as follows: "Whether the disposition of it be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, provided only he can identify them. If they cannot be identified by reason of the trust money being mingled with that of the trustee, then the *cestui que trust* is entitled to a charge upon the new investment to the extent of the trust money traceable into it; that there is no distinction between an express trustee and an agent, or bailee, or collector of rents, or anybody else in a fiduciary position; and that there is no difference between investments in the purchase of lands, or chattels, or bonds, or loans, or moneys deposited in a bank account": See *Farmers'*

etc. Nat. Bank v. King, 57 Pa. St. 202; 98 Am. Dec. 215; *Van Alen v. American Nat. Bank*, 52 N. Y. 1.

In accordance with this doctrine, we are of opinion that, on the facts found and agreed, there must be a decree for the plaintiff in the fourth case for the whole of the balance in the John Hancock National Bank.

The deposits in the savings banks, one in the names of "S. J. and U. M. Goodenough, subject to withdrawal by either," and the other in the names of "S. J. and Urania M. Goodenough, either to draw whole or part," must be taken to show either an intention on the part of the depositors—the persons named being husband and wife—that the amount deposited, if not withdrawn in the lifetime of both, should belong to the survivor, or the same inference is to be drawn as in the case of the deposit in the John Hancock National Bank. In either view, the title now would be in the representative of the wife's estate: See *Draper v. Jackson*, 16 Mass. 480; *Fisk v. Cushman*, 6 Cush. 20; 52 Am. Dec. 761; *Marshall v. Jaquith*, 134 Mass. 138; *Phelps v. Simons*, 159 Mass. 415; 38 Am. St. Rep. 430. It is plain that all but \$100 came from the property of Mrs. Goodenough. There is no direct evidence who deposited this \$100, or whose money it was, or where it came from, and the bank books were kept in the possession of both. It was deposited on August 6, 1884, which was after Mrs. Goodenough began to receive portions of her legacy from the executor of Mr. Maxwell. If any ³⁸⁵ inference is to be drawn from the facts found by the master, it is that it was the wife's money. The representative of Mr. Goodenough's estate does not offer any evidence tending to show that it was ever his property. As from the form of the deposits, the wife, after the husband's death, could have drawn all the money from each savings bank, and as it was probably all hers originally, we think that in these two suits there must be a decree for the whole amount in favor of the administratrix, with the will annexed, of the estate of Mrs. Goodenough.

So far as Mr. Goodenough has used her money for his own benefit, with her assent, his estate cannot now be held accountable for it. The most difficult question is whether it is to be inferred or presumed that the securities standing in his name, or marked with the initial letters of his name, which are shown to have been bought with the proceeds of her property, were put in his name with her assent, and with the intention

that they should become his property. The master has found, in effect, that she knew of, and assented to, what was done. On the whole, we think it must be inferred that she assented to the purchase of the securities by him in his name, and, as they were in the nature of permanent investments, that she intended them to be his property. The value of these securities is not so large, when compared with the value of the property which she retained, as to make such an inference unreasonable, and the discrimination shown in marking two of the bonds of the New Hampshire Investment Company "S. J. G.," and two "U. M. G.," perhaps tends to confirm this conclusion. If the title had been derived directly from her it may be that the securities would not become the property of his estate, as he did not survive her, and they were not kept in his exclusive possession during their joint lives. But the title was derived from a third person, although the consideration of the purchase came from her property. Such a transaction does not involve any contract between husband and wife or transfer of title directly from one to the other. If it was shown that these investments were intended to be in trust for her, or that her property was wrongfully used by him in making these investments, or was so used without her assent, the property could be followed, so long as it could be identified, and the securities would be declared to belong to her ³⁵⁶ estate, but none of these facts appears. The twenty shares of the Boston Investment Company, the ten shares of the Massachusetts Real Estate Company, the two bonds of the New Hampshire Investment Company marked on the back "S. J. G.," and the one share of the New Hampshire Investment Company, must, we think, be held to belong to his estate. The two bonds of the New Hampshire Investment Company marked on the back "U. M. G." must be held to belong to her estate.

Ordered accordingly.

HUSBAND AND WIFE—PRESUMPTION OF GIFTS FROM WIFE TO HUSBAND. This question is discussed in the recent cases of *Bennett v. Bennett*, 37 W. Va. 396; 38 Am. St. Rep. 47; and *Clark v. Patterson*, 158 Mass. 388; 35 Am. St. Rep. 498, with the notes thereto, in which the cases are collected. Where money is paid the wife, but the husband receives, counts, and keeps it, she is not bound to rescue it from him and proclaim that it is not a gift: *Bergey's Appeal*, 60 Pa. St. 403; 100 Am. Dec. 578, and note. See, also, the note to *Driggs' etc. Bank v. Norwood*, 7 Am. St. Rep. 82.

TRUSTS—FOLLOWING TRUST FUNDS.—Equity, in enforcing a constructive trust, can follow the real owner's property into whatever form it may be changed, so long as the fund or property into which it has been changed can

be traced until it goes into the hands of an innocent purchaser: *Farmers' etc. Bank v. Kimbell Milling Co.*, 1 S. Dak. 388; 36 Am. St. Rep. 739, and note; *Holmes v. Gilman*, 138 N. Y. 369; 34 Am. St. Rep. 463, and note; *Union Nat. Bank v. Goetz*, 138 Ill. 127; 32 Am. St. Rep. 119, and extended note. The conversion of trust funds wrongfully diverted does not destroy the right to follow them. When they are traced into the assets of the unfaithful trustee, or one who has knowledge of the character of the funds, they become a preferred charge upon the entire assets with which they are mingled, no matter of what such assets consist: *Myers v. Board of Education*, 51 Kan. 87; 37 Am. St. Rep. 263, and note. See also, *Connecticut etc. Ins. Co. v. Smith*, 117 Mo. 261; 38 Am. St. Rep. 656.

FISHER v. METROPOLITAN LIFE INSURANCE CO.

[160 MASSACHUSETTS, 386.]

INSURANCE—MONEY PAID FOR VOID, ACTION TO RECOVER.—If a wife procures insurance upon the life of her husband without his knowledge, but at the suggestion of an agent of the insurer, by signing the husband's name to an application, and to the examination form on the back thereof, and subsequently pays the premiums on such insurance for several years, and, on being informed that, under the rules of the company and the conditions of the policy, it is void, because of want of such consent, and thereupon she demands the repayment to her of the moneys so paid, her right to maintain an action therefor depends upon whether or not she was innocent of any fraudulent design against the company, and was deceived and misled by its agent, who caused her to obtain the insurance in the manner employed by her, and told her that it would be valid though so obtained.

ACTION for money had and received. The uncontradicted evidence tended to prove that an agent of the defendant solicited plaintiff's husband to effect an insurance upon his life for her benefit, which he refused to do; that thereafter such agent, without the knowledge of the husband, solicited plaintiff to effect such insurance, and procured a physician to visit and converse with the husband, and thereafter to sign the requisite examination; that the husband was not aware of the purpose of the physician in visiting him, nor did he know that any application had been made for insurance on his life; that the wife signed her name and that of her husband to the application for insurance, and also to the examination form on the back of the application; that the agent thereafter delivered to plaintiff a policy of insurance upon the life of the husband, payable to her in the event of his death, and that the plaintiff paid the premiums then and thereafter falling due for such insurance. The agent also delivered to

plaintiff a book upon which receipts of money paid by her were, from time to time, acknowledged, and the book contained extracts from the rules and regulations of the company to which the policy was subject. Among others was a rule stating that under no circumstances can an application be written upon the life of a husband, for the benefit of his wife, without his consent, nor without an examination by the physician of the company, nor unless the applicant personally signs the examination form on the back of the application after the answers to the application have been made, and that any policy issued in violation of those rules should be void. In July, 1892, plaintiff claimed that she was first informed of the invalidity of the policy for want of the consent of her husband, and that at that date she wrote a letter to the defendant's president, stating that she had discovered that the policy had been issued against the rules of the company, and was not enforceable, and that the company's agent had told her at the time it was issued that it was all right. She therefore stated that she wished her money back. The insurer did not make any direct reply to this letter, but afterwards one of the agents solicited plaintiff to continue her payments, which she refused to do, and again demanded repayment of the money paid by her as premiums, which demand being refused, she commenced this action. The court gave the following instruction, to which the defendant excepted: "I instruct you, as a general proposition of law, that if there had been misrepresentations made to her which induced her to make the contract with the company, then she had a right to rescind the contract, when she discovered the fact of these misrepresentations having been made, and, having thus rescinded the contract, and put the defendant in the condition it was before the making of the contract, then she would have the right, as matter of law, to recover the money she had paid in pursuance of the contract. She had the right to annul the contract, and, having annulled it, then you will observe that the defendant had among its funds money of hers, received from her, which, in equity and good conscience, it ought not to hold, but should pay it to her, provided she was induced to make the contract by misrepresentations on the part of the company." The defendant also excepted to the refusal of the court to give the following instructions to the jury: "1. If the plaintiff was guilty of forgery in writing her husband's name upon the application, and the

defendant issued the policy in good faith, she cannot recover; 2. If the plaintiff was not guilty of forgery, but was guilty of fraud or collusion with Bannigan, and the defendant issued the policy in good faith, the plaintiff cannot recover; 3. The plaintiff having signed the application for insurance, she cannot set up her own fraud or unlawful collusion with Bannigan, in avoidance of the contract of insurance; 4. This plaintiff cannot set up the fraud of Bannigan, of which she was cognizant, or in which she participated; 5. If the defendant was the insurer upon this application in good faith, without notice of fraud or forgery, the defendant can avoid the policy; but in case the defendant did not avoid the policy, it would be valid."

W. A. Gile, for the defendant.

J. R. Thayer, for the plaintiff.

390 FIELD, C. J. If this were an action on the policy, it could not be maintained on the evidence appearing in the exceptions: *McCoy v. Metropolitan Life Ins. Co.*, 133 Mass. 82.

391 If the plaintiff, in collusion with Bannigan, the defendant's agent, intended to cheat the company or practice a fraud upon it, then the money she has paid the company was paid in pursuance of this fraudulent intention, and she cannot recover it back; but if she was innocent of any fraudulent intent, and was deceived by Bannigan, and induced by his fraudulent representations to make the application, then she could rescind the contract of insurance when she discovered the fraud, and recover back the amount of the premiums which she had paid: *Hedden v. Griffin*, 136 Mass. 229; 49 Am. Rep. 25. The position of the defendant is, that it could avoid the policy, but that the plaintiff could not, and that, as the plaintiff, after she found out that she could not enforce the policy, paid no more premiums, but demanded back the amount of the premiums she had paid, the policy has become void, by reason of the nonpayment of the premium, and that, therefore, no action can be maintained to recover back the money paid. Under the rules of the company to which the policy was subject, the policy was void or voidable from the beginning, because the husband of the plaintiff did not sign the examination form on the back of the application, or know of, or consent to, the insurance. The evidence to prove this was properly admitted. The difficulty is in dealing with the instructions requested, and with the charge of the presiding

justice. The first four instructions ought to have been given, if they be taken to mean that the plaintiff could not recover if she intended to defraud the company or knowingly participated in the fraudulent acts of Bannigan. The court declined to give these instructions, to which the defendant excepted, and also excepted to a portion of the charge to the jury. This portion of the charge relates to the effect of the misrepresentations of the agent, and to the plaintiff's right to rescind the contract, if the plaintiff was induced to make it by these misrepresentations. The instructions given upon the effect of the fact that she concealed what she had done from her husband are correct, if she was innocent of any intention to evade the rules of the company, and thus to obtain a policy from it which she knew it would not issue if it had known that her husband had not signed his name on the back of the application, and had not consented to the insurance. But it does not appear by the exceptions that any instructions³⁹² were given upon the effect of her participation in Bannigan's fraud, if she did participate in it. There are some indications in the part of the charge contained in the exceptions that the presiding justice regarded it as plain that, if she knowingly participated in Bannigan's fraud, she could not recover, and that the instructions set out in the exceptions were predicated upon the assumption that the jury should find that she was innocent of any fraudulent intent against the company, and was deceived and misled by the misrepresentations of its agent. It was, we think, competent for the jury, on the evidence, to find either that she was or was not innocent of any attempt to evade the rules of the company, and to procure from it a contract which she knew it would not have made if it had known that her husband had not signed the examination form on the back of the application, and had not consented to the insurance. Upon the whole, as it does not appear that the presiding justice gave any instructions upon the subject of the first four requests of the defendant, and as these were absolutely denied, we think that the exceptions should be sustained.

So ordered.

INSURANCE—RECOVERY OF PREMIUMS WHERE POLICY IS VOID.—Where no risk has attached under a policy of fire insurance, the insurer must return the premium paid, provided the insured has been guilty of no fraud: *Jones v. Insurance Co.*, 90 Tenn. 604; 25 Am. St. Rep. 706. Premiums paid on a life policy may be recovered by the assured from the insurer as money

had and received, if the latter wrongfully refuses to receive a premium when due on such policy: *McKee v. Phoenix Ins. Co.*, 28 Mo. 383; 75 Am. Dec. 129; *McCall v. Phoenix etc. Ins. Co.*, 9 W. Va. 237; 27 Am. Rep. 558, and note. *Contra*: See *Day v. Connecticut etc. Ins. Co.*, 45 Conn. 480; 29 Am. Rep. 693. Though an insurance be void for fraud committed by the insured, he is not entitled to a return of the premium: *Himely v. South Carolina Ins. Co.*, 1 Mill Const. 153; 12 Am. Dec. 623.

WRIGHT v. ABBOTT.

[160 MASSACHUSETTS, 895.]

JURY TRIAL.—**MISCONDUCT OF JURY** may be proved on a motion for a new trial by the testimony of a deputy sheriff, in whose charge they were, as to what he heard said by the jury in the jury-room tending to show that the cause was decided by lot or by the drawing of ballots from a hat in which ballots had been put, some marked for the plaintiff and some for the defendant.

ON a motion for a new trial a deputy sheriff was called as a witness, and, against the objection of a plaintiff, was permitted to testify that he overheard the deliberations of the jury in the jury-room, and he detailed the conversations thus overheard, from which it appeared that eleven ballots were put in a hat, eight marked for the defendant and three for the plaintiff, and thereupon it was agreed that one member of the jury, being blindfolded, should draw out a ballot, and that the verdict of the jury should depend upon the ballot thus drawn, but that he heard one of the jurors say, "The ballot drawn out is for the plaintiff," and that shortly thereafter the foreman said that the jury had agreed, and coming immediately into court rendered a verdict for the plaintiff.

J. C. Sanborn, for the plaintiff.

J. P. Sweeney, for the defendant.

396 FIELD, C. J. The single question in this case is whether, on a motion for a new trial on account of the alleged misconduct of the jury, it is competent for a deputy sheriff, who had the charge of the jury during their deliberations in the jury-room, to testify **397** to what he heard said and done by the jury in the jury-room, for the purpose of showing that the jury decided the case by lot, or by the drawing of a ballot from a hat in which ballots had been put, some marked for the plaintiff and some for the defendant.

It is certainly not the duty of an officer in charge of a jury

to listen to the deliberations of a jury in the jury-room; but if he does, his testimony cannot be excluded on the ground that his knowledge was obtained in this manner, if it is otherwise competent. The rule excluding testimony of the conduct of jurors in the jury-room, when deliberating upon a verdict, ought to have some limits. It seems that, in England, it has been finally settled that the affidavit of a juror will not be received to show that the verdict was determined by lot: *Vaise v. Delaval*, 1 Term Rep. 11; *Owen v. Warburton*, 1 Bos. & P., N. R., 326; *Straker v. Graham*, 7 Dowl. Pr. 223, 225. The weight of authority in this country, also, is that the affidavits or the testimony of jurors, to show such a fact, will not be received: *Dana v. Tucker*, 4 Johns. 487; *Cluggage v. Swan*, 4 Binn. 150; 5 Am. Dec. 400; *Brewster v. Thompson*, 1 N. J. L. 32; *Grinnell v. Phillips*, 1 Mass. 530, is regarded as overruled in *Woodward v. Leavitt*, 107 Mass. 453, 461, 462; 9 Am. Rep. 49. It has always been held that, if a verdict is obtained by resorting to chance or by drawing lots, it will be set aside: *Mitchell v. Ehle*, 10 Wend. 595; *Donner v. Palmer*, 23 Cal. 40; *Ruble v. McDonald*, 7 Iowa, 90; *Birchard v. Booth*, 4 Wis. 67; *Dorr v. Fenno*, 12 Pick. 521; *Forbes v. Howard*, 4 R. I. 364. In *Vaise v. Delaval*, 1 Term Rep. 11, where a verdict was obtained by tossing up, Lord Mansfield said: "The court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor; but in every such case the court must derive their knowledge from some other source; such as from some person having seen the transaction through a window, or by some such other means."

In *Wilson v. Berryman*, 5 Cal. 44, 63 Am. Dec. 78, the verdict was what is called a quotient verdict, and the court, while conceding that the affidavit of a juror could not be received, admitted the affidavit of the undersheriff that the affidavit of the juror was true.

Either the law that a verdict must be set aside if determined by lot is nugatory, because the fact cannot be proved, or there ³⁹⁸ must be a possible means of proving it. If, on grounds of public policy, the affidavits or the testimony of jurors concerning what took place in the jury-room is excluded, as well as evidence of their subsequent declarations on the subject, still, we are of opinion that independent evidence should be admitted, and that the consequences to be apprehended from admitting such evidence are less harmful

than the consequences of forbidding all inquiry into such a matter. We think that the presiding justice properly refused to rule as requested.

Exceptions overruled. —

NEW TRIAL.—IRREGULAR MODE OF ARRIVING AT VERDICT: See the extended notes to *Hilton v. Southwick*, 35 Am. Dec. 259, and *Warner v. Robinson*, 1 Am. Dec. 38; also *Dixon v. Plums*, 98 Cal. 384; 35 Am. St. Rep. 180, and note.

NEW TRIAL.—IMPEACHING THE VERDICT BY AN AFFIDAVIT OF A JUROR is not permitted: *State v. Dusenberry*, 112 Mo. 277; *Little v. Birdwell*, 21 Tex. 597; 73 Am. Dec. 242, and note; *Knowlton v. McMahon*, 13 Minn. 386; 97 Am. Dec. 236, and note; *Conner v. Winton*, 8 Ind. 315; 65 Am. Dec. 761; *Newton v. Booth*, 13 Vt. 320; 37 Am. Dec. 596, and note; *St. Martin v. Desnoyer*, 1 Minn. 156; 61 Am. Dec. 494, and note. See, also, the extended note to *Crauford v. State*, 24 Am. Dec. 475-479.

GOULD v. EMERSON.

[160 MASSACHUSETTS, 438.]

EQUITY—MISTAKE.—If through mistake, on a sum being ascertained to be due from a partner to a firm, of which he is a member, he gives his note to his copartner for the whole of such amount, instead of for one-half thereof, equity will grant relief, and require the repayment of any sum paid in excess of that equitably due.

STATUTE OF LIMITATIONS.—WHERE A MISTAKE in paying moneys is to be corrected by a court of equity, the statute of limitations does not begin to run until the time when the mistake is discovered, or, at any rate, until the time when, by the use of due diligence, it ought to have been discovered.

INTEREST WILL NOT BE ALLOWED ON MONEYS PAID BY MISTAKE and without fraud or knowledge of such mistake, unless there is an express promise to pay such interest, or unless demand has been made for the repayment of the moneys received by mistake, and then only from the date of such demand.

L. Le B. Holmes, for the defendant.

H. J. Fuller, for the plaintiff.

439 ALLEN, J. There was a plain mistake in the giving of the note for \$10,000 to the defendant. It should have been for only \$5,000. There was no fraud, but it was a case of mutual mistake as to the manner of carrying out what had been settled and agreed on. Upon dissolving the partnership between the plaintiff and the defendant, the plaintiff was to take the goods on hand, and pay the defendant for his interest therein. The value of the goods was fixed at \$16,000, and

the plaintiff gave to the defendant his note for \$8,000, and this has been paid. There was no mistake as to this. But the plaintiff had withdrawn from the funds of the firm \$10,000 more than the defendant had, and to make this right between the parties, the plaintiff would have to restore the \$10,000 to the firm, or pay the defendant for his share thereof, which would be \$5,000. Instead of doing this, by sheer inadvertence or ignorance of what is plain when you come to look at it carefully, the plaintiff gave his note for \$10,000 to the defendant. This gave to the defendant the whole of a sum which belonged to the firm, and which he was entitled to only one-half of. The mistake, though gross, was mutual and innocent; and the plaintiff, at any time upon discovering it, might have had a bill in equity for relief against it: *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290, 319, 320; *Canedy v. Marcy*, 13 Gray, 373; *Wilcox v. Lucas*, 121 Mass. 21; *Goode v. Riley*, 153 Mass. 585; *Beauchamp v. Winn*, L. R. 6 H. L. 223; *Daniell v. Sinclair*, L. R. 6 App. C. 181, 190, 191; *Paget v. Marshall*, L. R. 28 Ch. D. 255. And though the contract has been executed, a court of equity may grant relief and decree repayment of money so paid by mistake: *Tarbell v. Bowman*, 103 Mass. 341; *Wilson v. Randall*, 67 N. Y. 338; *Paine v. Upton*, 87 N. Y. 327; 41 Am. Rep. 371.

The defendant relies on the statute of limitations. The bill was brought January 28, 1893. One payment of \$500 on the principal of the note was made more than six years before that date, but that payment should be applied on the sum rightfully due to the defendant. One payment of \$300 for interest was made more than six years before that date, and \$150 of this would properly be appropriated to the interest on the sum rightfully ⁴⁴⁰ due as principal. This leaves only \$150 to be affected by the question of the statute of limitations. Where a mistake in paying money is to be corrected by a court of equity, the statute of limitations does not begin to run until the time when the mistake was discovered, or at any rate till the time when, by the use of due diligence, it ought to have been discovered. It was not, in fact, discovered till about November 1, 1892, and on the facts which are found in the report of the case no earlier date can be fixed for the commencement of the time of the running of the statute: *Wells v. Child*, 12 Allen, 333, 335; *Brooksbank v. Smith*, 2 Younge & C. 58; *Ecclesiastical Commrs. v. North Eastern Ry.*

Co., L. R. 4 Ch. D. 845, 860; *Thomas v. Bartow*, 48 N. Y. 193; Story's Equity Jurisprudence, sec. 1521 a.

The defendant also relies on the defense of laches, but the justice of the superior court who heard the case and saw the parties was of the opinion that the plaintiff was not guilty of laches, and we see no reason to differ from him: *Tarbell v. Bowman*, 103 Mass. 341; *Beauchamp v. Winn*, L. R. 6 H. L. 223.

Upon the facts already referred to, the relief to which the plaintiff would be entitled would be to have his original note of \$10,000, upon which he has paid \$6,000, surrendered and canceled, and to have the overpayment of \$1,000 refunded, and also to have the interest refunded which he has paid in excess of the interest due on the \$5,000, which he justly owed. The \$10,000 note should be treated as valid for \$5,000, and all payments of principal or interest in excess of what would have been due if the note had been for \$5,000 should be refunded. These overpayments amounted, as we understand from the decree, to \$1,000 upon the principal, and \$1,800 upon the interest.

It appears, however, that the plaintiff owes the defendant another note for \$1,000 for borrowed money, and the decree provided that the defendant should surrender this note to the plaintiff, which was intended to be in place of refunding the \$1,000. There was no error in this, the defendant assenting that if the plaintiff is entitled to have the \$1,000 refunded, it shall be done in this way.

The decree further required the defendant to pay to the plaintiff an additional sum of \$459, being interest upon the overpayments ⁴⁴¹ of interest. We do not find any thing in the pleadings or in the facts of the case to warrant this part of the decree. The defendant received the note and the payments made upon it without fraud or knowledge of the mistake, and without any promise to pay interest upon the sums so received by him. Under these circumstances, no interest is recoverable until a demand, or until the date of the bill: *Hubbard v. Charlestown Branch R. R. Co.*, 11 Met. 124; *Ordway v. Colcord*, 14 Allen, 59; *Gay v. Rooke*, 151 Mass. 115, 117; 21 Am. St. Rep. 434; *Hutchinson v. Liverpool etc. Ins. Co.*, 153 Mass. 143.

The decree is to be amended so as to allow the plaintiff to recover interest upon his overpayments after demand, or after the date of the bill. In other respects it is to be affirmed.

MISTAKE.—ACTIONS TO RECOVER MONEY PAID BY MISTAKE OF FACT: See the extended note to *Buffalo v. O'Malley*, 50 Am. Rep. 139-141. Money paid to the holder of a check or draft drawn without funds may be recovered back, if paid by the drawee under a mistake of fact: *Merchants' Nat. Bank v. National Eagle Bank*, 101 Mass. 281; 100 Am. Dec. 120, and note with the cases collected. Money paid through a mistake of fact, in respect to which both parties were equally bound to inquire, may be recovered back: *Wolf v. Beaird*, 123 Ill. 585; 5 Am. St. Rep. 565, and note; *Appleton Bank v. McGilvray*, 4 Gray, 518; 64 Am. Dec. 92; *Northrop v. Graves*, 19 Conn. 548; 50 Am. Dec. 264, and note.

LIMITATIONS OF ACTIONS—MISTAKE.—The statute of limitations in equity runs from the time of the discovery of the mistake; laches cannot be attributed before that time: *Stone v. Hale*, 17 Ala. 557; 52 Am. Dec. 185, and note.

INTEREST—MISTAKE.—Where money has been paid under a mistake, interest does not accrue upon it until a demand for repayment has been made: *Northrop v. Graves*, 19 Conn. 548; 50 Am. Dec. 264, and note.

BLISS v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

[160 MASSACHUSETTS, 447.]

EVIDENCE—EXPERT AS TO CONDITION OF MIND.—A physician who has heard a detailed statement of injuries received in a railway accident may be permitted to testify as to their probable or possible effect on the mental faculties of the person injured, when he, on his part, claims that a receipt executed by him soon afterwards was executed while he was in a rattled or dazed condition, and others testify that he was in his usual condition, and apparently not suffering from any undue excitement or any impairment of his mental faculties.

FRAUD IN PROCURING A RECEIPT AND RELEASE.—If the plaintiff testifies that soon after a railway accident, and while he was suffering therefrom and dazed and rattled thereby, he was taken to the office of the railway company, and asked what the damage to his clothing was, and on his stating what it was, two papers were presented to him, one of which he understood to be a bill for such clothing, and the other was said by an officer of the company presenting it to be a mere matter of form, and if he signs both papers without reading either, and accepts the sum named as damage to his clothing, and it turns out that the papers were a receipt for, and release of, damages sustained for personal injuries, this is sufficient evidence to submit to the jury of fraud in procuring the release and receipt, and their verdict to that effect will not be set aside in the appellate court.

JUDGMENT—MERGER.—If a person in a railway accident receives an injury to his person and to his clothing, they furnish but one cause of action, and a recovery for either precludes any further recovery for the other.

RELEASE OF PART OF DAMAGES SUSTAINED BY AN INJURY.—If a person by the same accident is injured in his person and also in his clothing, and

accepts payment for his clothing, it does not release that part of his cause of action founded upon his personal injuries.

PAYMENT, RETURN AND RESCISSION OF, WHEN ESSENTIAL TO CAUSE OF ACTION.—If a person injured receives payment for part of the injury, and a receipt is procured from him by fraud purporting to release his whole cause of action, he is not obliged to return the money thus paid to him before maintaining an action to recover for the residue of his injuries for which no compensation has been made.

Samuel Hoar, for the defendant.

A. Hemenway, for the plaintiff.

⁴⁵³ ALLEN, J. 1. The objection to the question to Dr. Walton is placed on the ground that the question ought to have been limited to the probable effect of the injury upon the plaintiff, and that the question which was allowed to be put went too far in asking as to its possible effect. As bearing upon the alleged fraud of the defendant's agent in procuring the release and receipt, it is obvious that the mental condition of the plaintiff was important to be considered. If his mind was clear and strong, he was more likely to understand what he was doing and less likely to be imposed upon. He had himself testified that he was "rattled, dazed," at the time. A witness for the defendant had testified that the plaintiff did not appear to be so; and there was other evidence in defense tending in the same way. There being this conflict of evidence as to his actual condition, it was certainly competent for the court, in its discretion, to admit the testimony of an expert that his mind might be dazed or confused as the result of such an accident as he had described, even though the testimony did not go so far as to show that this result was probable.

2. The defendant contends that there was no sufficient evidence to be submitted to the jury of fraud on the part of its agent in procuring the release and receipt. The evidence in favor of the plaintiff on this point was, in substance, that in the accident he had received a shock which had finally resulted in serious damage to him; that he bore marks of the direct injury upon his face; that his mind was rattled and dazed at the time; that while he was in this condition, about an hour and a half after the accident, in the office of the defendant's superintendent, the defendant's agent prepared the two papers for him to sign, and ⁴⁵⁴ passed the release to him saying, "this is merely a form," and said that the second paper was merely a receipt for the trousers and

hat; that both of these statements were false; and that he signed both papers without reading them or knowing their contents. The witnesses for the defense gave a fuller account of what took place at this interview, with particulars which the plaintiff denied to be true, or denied having any remembrance of. The defendant's agent testified that nothing was allowed by way of payment for personal injuries, and that no claim was made for such injuries. Upon this evidence it might be argued in behalf of the plaintiff that he supposed he was receiving payment merely for the injuries to his clothing, but did not understand that he was cutting himself off from a claim for personal injuries; that if he was in fact rattled and dazed in mind, the defendant's agent would probably have observed it; and that the insertion of the words "also injury to person," in the receipt for the damages to his clothing, and the taking of the release of all claims whatever in consideration of the payment of seventeen dollars, and in view of the declarations of the defendant's agent to the plaintiff, tended to show fraud. The weight of argument and evidence was for the jury. All that we need say is that the conclusion of the jury was warranted: *Freedley v. French*, 154 Mass. 339; *Peaslee v. Peaslee*, 147 Mass. 171, 180; *O'Donnell v. Clinton*, 145 Mass. 461; *Trambly v. Ricard*, 130 Mass. 259.

3. The defendant further contends that the plaintiff cannot maintain this action, because, before bringing it, he failed to restore to the defendant the money which the defendant had paid to him for the damage to his hat and trousers. It is plain that the plaintiff's release and receipt do not, of themselves, stand in the way of his maintaining the action, because, so far as they relate to his personal injury, they must now be assumed to have been obtained from him by fraud: *Rosenberg v. Doe*, 148 Mass. 560; 146 Mass. 191; *O'Donnell v. Clinton*, 145 Mass. 461; *Squires v. Amherst*, 145 Mass. 192; *Mullen v. Old Colony R. R. Co.*, 127 Mass. 86; 34 Am. Rep. 349; *Smith v. Holyoke*, 112 Mass. 517. The release and receipt are to be read as if they did not purport to discharge any claim he might have for personal injury, and, by reason of the fraud, the case is free from any question of the admissibility of parol evidence to vary or control the writing. But ⁴⁵⁵ the objection is that the retention of the money precludes him. It is true, under our decisions, that the injury to the plaintiff's person and to his clothing furnished but one cause of action, and that a recovery of judgment by him for

the injury to his clothing would have barred a subsequent action for his personal injury: *Doran v. Cohen*, 147 Mass. 342; *Knowlton v. New York etc. R. R. Co.*, 147 Mass. 606; *Sullivan v. Baxter*, 150 Mass. 261; *McCaffrey v. Carter*, 125 Mass. 330; *Folsom v. Clemence*, 119 Mass. 473; *Goodrich v. Yale*, 8 Allen, 454; *Trask v. Hartford etc. R. R. Co.*, 2 Allen, 331; *Bennett v. Hood*, 1 Allen, 47; 79 Am. Dec. 705. In this respect, the law, as established here, differs from that of England, upon which the plaintiff relied in argument: *Brunsdan v. Humphrey*, 14 Q. B. Div. 141; *Darley Main Colliery Co. v. Mitchell*, 11 App. Cas. 127, 144, per Lord Bramwell; *Macdougall v. Knight*, 25 Q. B. Div. 1, 8. In the present case, however, the plaintiff has recovered no judgment, and has brought no prior action for the injury to his clothing, and the question which we have to determine is, whether, before bringing this action, he was bound to return the seventeen dollars received for the injury to his clothing, and whether the action is defeated by the omission so to return it. The defendant contends that accepting payment for a part of the injury which he sustained, and retaining the money, debars the plaintiff from maintaining an action for the other part of the injury, just as the recovery of a judgment for one part of the injury would debar him. But there are good reasons for holding the contrary doctrine. If one sues to recover for an injury, he may well be held to include in his action all that he is entitled to sue for in respect to that cause of action. But if one is making a settlement, the same reasons do not apply, and if he cannot make a full settlement, he may make a partial one, and thus eliminate one element out of the controversy. If, for example, there is an insurance on real and personal property, and a fire occurs destroying all of the property insured, or if a fire, set by sparks from a locomotive engine, or other wrongful act, spreads and causes damage to real and personal property, or to different buildings of the same owner, the parties undoubtedly may settle the claim as to one piece of property, leaving it open as to the others; and in such case, a payment for so much as has been agreed on certainly ⁴⁵⁶ would not debar the owner from recovering what he is entitled to in respect to the rest. Now, if such was the oral agreement of settlement as to a part of the loss, and the owner was, by fraud, led to sign a receipt for his whole claim, and if he afterwards sues for that part of his loss which has not been paid for, and is able to set aside and avoid the terms

of his receipt by reason of the fraud, there is no good reason why the payment for his loss upon one piece of his property should debar him from recovering for the loss upon the rest, even though he retains the money so paid to him. Why should he pay it back, when it represents only the sum agreed on for his compensation for that portion of his loss which he no longer seeks to recover for? So here, the plaintiff must now be deemed to have received the seventeen dollars for the injury to his clothing alone. Thus much was adjusted between the parties and paid for. The plaintiff, although he included a claim for damage to clothing in his declaration, does not now seek to recover for that loss, or to avoid the settlement, which, he says, he actually made with the defendant's agent. On the other hand, he stands to, and affirms, all that was included in the settlement actually made. If it was understood at the time that the payment was received only for the injury to his clothing, and that no claim for personal injury was settled for or released, and if the release and receipt were by fraud so phrased as to cover that claim also, and if they are avoidable by reason of the fraud, so far as the claim for personal injury is concerned, the plaintiff was under no obligation to return the money received by him for the injury to his clothing before bringing his action for the personal injury: *Mullen v. Old Colony R. R. Co.*, 127 Mass. 86; 34 Am. Rep. 349; *Smith v. Holyoke*, 112 Mass. 517; *Bartlett v. Drake*, 100 Mass. 174; 97 Am. Dec. 92; 1 Am. Rep. 101; *Walker v. Swasey*, 2 Allen, 312; *Roberts v. Eastern Counties Ry. Co.*, 1 Fost. & F. 460, cited with approval in *Lee v. Lancashire etc. Ry. Co.*, L. R. 6 Ch. 527, 537.

Exceptions overruled. —

WITNESSES—EXPERTS.—TESTIMONY OF PHYSICIAN AS TO PROBABLE EFFECT OF INJURY: See *Benjamin v. Holyoke etc. Ry. Co.*, 160 Mass. 3; ante, p. 446, and note, with the cases collected.

RELEASE OF PART OF DEMAND: See the extended note to *Jones v. Perkins*, 64 Am. Dec. 138. Unless impeached for fraud or duress, or traversed as not genuine, a release under seal is a defense to an action, and the plaintiff cannot allege or prove that it was without consideration, or that the amount paid was not all that was due: *Spitae v. Baltimore etc. R. R. Co.*, 75 Md. 162; 32 Am. St. Rep. 378, and note. It seems, however, that when a general release is pleaded as a defense, the plaintiff may show that, by mistake on his part and fraud on the part of the defendant, the cause of action was included in the release, contrary to the agreement and intent of the parties, or, in case of fraud, contrary to his intent: *Kirchner v. New Home etc. Machine Co.*, 135 N. Y. 182. But compare *Hayes v. East Tennessee etc. Ry. Co.*, 89 Ga. 264.

RELEASE—FRAUD—RETURN OF CONSIDERATION.—One who fraudulently obtains from another his signature to a discharge of a cause of action against him by misrepresenting the character of the paper may maintain the action without returning the money: *Mullen v. Old Colony R. R. Co.*, 127 Mass. 86; 34 Am. Rep. 349.

WATTS v. WATTS.

[160 MASSACHUSETTS, 464.]

RES JUDICATA.—If A DEFENSE IS NOT INTERPOSED to an action or proceeding, nor any determination therein made respecting it, the party in whose favor it exists is not precluded from urging it as a cause of action or of defense in a subsequent proceeding which is independent of the original suit. Hence, if a husband is sued by his wife for separate support and maintenance, and a judgment is entered in her favor on the ground that she is living apart from him for justifiable cause, this does not estop him in a subsequent suit for divorce from proving that prior to the former proceeding she had been guilty of adultery, and ejected from his house for that cause, provided he did not, in the former proceeding, attempt to defend on the ground of such adultery, and it was not brought to the attention of the court either by pleading or evidence.

RES JUDICATA.—A DECREE AFFIRMING THAT A WIFE IS LIVING APART FROM HER HUSBAND FOR JUSTIFIABLE CAUSE does not necessarily affirm that she had not been guilty of adultery, nor preclude him from subsequently maintaining a suit for divorce on the ground of such adultery.

RES JUDICATA.—A DECREE AFFIRMING THAT A WIFE IS LIVING APART FROM HER HUSBAND FOR JUSTIFIABLE CAUSE DOES NOT NECESSARILY AFFIRM that she has a cause entitling her to a divorce, nor that a cause of divorce does not exist in favor of her husband against her.

J. F. Simmons and H. H. Pratt, for the libellant.

C. M. Perry, for the libelee.

463 KNOWLTON, J. In regard to subjects of which the probate court has jurisdiction, and upon parties brought within its jurisdiction, a decree of that court, like a judgment of other courts, is conclusive: *Laughton v. Atkins*, 1 Pick. 535; *Pierce v. Prescott*, 128 Mass. 140; *McKim v. Doane*, 137 Mass. 195; *Miller v. Miller*, 150 Mass. 111.

The decree introduced at the trial, being between the same parties as those in the present action, is binding and conclusive upon them in this suit in regard to all matters shown to have been put in issue or to have been necessarily involved in the former suit, and actually tried and determined in it. In regard to matters not then in controversy and not heard and determined, although it is conclusive so far as the final disposition of that cause of action is concerned, it is not con-

clusive to prevent a determination of them according to the truth if they are subsequently controverted in a different case: *Burlen v. Shannon*, 14 Gray, 433, 437; *Thurston v. Thurston*, 99 Mass. 39; *Burlen v. Shannon*, 99 Mass. 200; 96 Am. Dec. 733; *Lea v. Lea*, 99 Mass. 493, 496; 96 Am. Dec. 772; *Hawks v. Truesdell*, 99 Mass. 557; *Commonwealth v. Evans*, 101 Mass. 25; *Lewis v. Lewis*, 106 Mass. 309; *Foye v. Patch*, 132 Mass. 105, 111; *Cromwell v. Sac Co.*, 94 U. S. 351. It would be a harsh and oppressive rule which should make it necessary for one sued on a trifling claim to resist it, and engage in costly litigation in order to prevent the operation of a judgment which would be held conclusively to have established against him every material fact alleged and not denied in the declaration, so as to preclude him from showing the truth if another controversy should arise between the same parties. There might be various reasons why he would prefer to submit to a claim rather than to defend against it. For the purpose of defending that suit, he would have his day in court but once, and if he chose to let the case go by default, or with a trial upon some of the defenses which might be made and not upon others, he would be obliged forever after to hold his peace. But a plaintiff can claim no more than to be given what he asks in his writ. He cannot justly complain that the defendant has not seen fit to set up ⁴⁶⁶ defenses, and raise issues for the purpose of enabling him to settle facts for future possible controversies. In subsequent proceedings, which are independent of the original suit, the judgment in that suit is conclusive as evidence, or may be pleaded as an estoppel only as to those matters which were put in issue and determined; but it is not necessary that these should be particularly mentioned in the pleadings if they are involved in the issue made up, and if the case is determined upon the trial of that issue. The bill of exceptions in this case shows nothing in regard to the pleadings in the probate court, further than that there was a petition brought under the Public Statutes, chapter 147, section 33, and that the respondent appeared and defended against it. It appears that no evidence was offered of the act of adultery on June 4, 1892, and we infer that it was not set up in answer to the petition. We must assume that the respondent's pleading was a general denial. Was the question whether the petitioner had committed adultery, as now appears, necessarily involved in the issue made up by an affirmation and denial that she was liv-

ing apart from her husband for justifiable cause? The grounds of the decree do not appear. Could such a decree have been made upon any possible state of facts if the petitioner had been known to have committed adultery on June 4, 1892? If so, the decree could not be held to be a bar to a divorce, unless the only facts which would render the decree possible are such as would of themselves preclude the libelant from obtaining a divorce. The decision that a wife is living apart from her husband for a justifiable cause, made upon a hearing between them on the general issue, conclusively shows that she has not utterly deserted him: *Miller v. Miller*, 150 Mass. 111. Living apart from a husband under such circumstances as to constitute utter desertion, for which a divorce may be granted, is a marital wrong, and cannot be legally justifiable. But facts may be supposed upon which the decision of the probate court might have been made in the present case, even if it were known that the wife was guilty of adultery, of which the husband had knowledge. If he had for a long time been guilty of extreme cruelty towards her, and had inflicted serious bodily injury upon her when he ejected her from his house, and then had asked her to return to his home, and had offered to forgive the adultery if she would ⁴⁶⁷ come back, she would have been justified in refusing to return on the ground that she had reason to fear great injury from his cruelty if she continued to live with him. If such facts appeared, the court might well decide that she was justifiably living apart from him on account of his cruelty, notwithstanding her adultery, which he was willing to forgive. It is obvious, therefore, that the decision in her favor on the question whether she was living apart from him for a justifiable cause is not necessarily a finding that she was not guilty of adultery, and upon the record before us it cannot be said that her guilt or innocence was necessarily involved in the issue then tried.

It may be said, however, that the facts above supposed are such as would bar his suit for a divorce, and that, therefore, such a hypothesis cannot help him in this case. It is true that the extreme cruelty of a libelant is a defense to a libel for a wife's adultery: *Handy v. Handy*, 124 Mass. 394; *Cumming v. Cumming*, 135 Mass. 386, 389; 46 Am. Rep. 476; *Morrison v. Morrison*, 142 Mass. 361; 56 Am. Rep. 688.

But there may be other causes which would justify her in living apart from him less than those which would be a

ground for a divorce in her favor. Such causes could not be availed of as an answer to his libel for a divorce on the ground of her adultery, although they might warrant this finding of the probate court. Against this proposition, it is argued forcibly by a prominent author that no cause should be deemed sufficient to justify withdrawal from cohabitation which is not enough to call for a judicial separation: 1 Bishop on Marriage, Divorce, and Separation, sec. 1753. This until recently was the law in England, and it is still the law in some of the American states. But it is now held by the English courts that the use of the words "separation without reasonable cause," in the statute in reference to desertion, implies that there may be a separation with a reasonable cause, which is some thing less than the causes for which a divorce may be granted: *Yeatman v. Yeatman*, L. R. 1 Pro. & D. 489, 491; *Haswell v. Haswell*, 1 Swab. & T. 502; 29 L. J., N. S., P. & M. 21. So, too, a voluntary separation of husband and wife is not there deemed to be against public policy, and articles of separation entered into by a husband and wife are enforced by courts of equity: *Wilson v. Wilson*, 1 H. L. Cas. 538; *Besant v. Wood*, 12 Ch. Div. 605; *Hart v. Hart*, 18 Ch. Div. 670.

468 In this commonwealth it has been held that an indenture whereby a husband agrees to pay to a trustee money for the support of his wife, made in contemplation of an immediate separation, which takes place as contemplated, is not void as against public policy: *Fox v. Davis*, 113 Mass. 255; 18 Am. Rep. 476. In *Lyster v. Lyster*, 111 Mass. 327, Mr. Justice Gray says, in giving the opinion of the court: "It has accordingly been declared by a great weight of American authority that ill treatment or misconduct of the husband, of such a degree or under such circumstances as not to amount to cruelty for which the wife would be entitled to sue for a divorce against him, might yet justify her in leaving his house, and prevent his obtaining a divorce for her desertion if she did so". See, also, cases there cited. The statute which we are considering (Pub. Stats., c. 147, sec. 33) permits the husband as well as the wife to apply to a court to obtain an order "concerning the support of the wife, and the care, custody, and maintenance of the minor children," thus implying that the provisions of the statute are not alone for the benefit of a wife whose husband has been guilty of misconduct which would be a cause for a divorce. If, to obtain the benefit of its provisions, a wife were obliged to show misconduct of the

husband which would be a cause for a divorce, it would add but little to the provisions of previous statutes, under which, in divorce proceedings, she could obtain orders for alimony, and in regard to the custody and support of minor children.

We are of opinion that under this statute the wife may show that she is living apart from her husband for a justifiable cause, without necessarily going so far as to show a cause which would entitle her to a divorce, and that the reasons required to warrant the decree of the probate court in the present case were not necessarily reasons which would preclude a husband from obtaining a divorce for adultery from the wife. Precisely what reasons would justify a wife in withdrawing and living apart from her husband, so as to subject the husband to a liability for her support away from his home under this statute, it is unnecessary in this case to determine. It is enough that the cause may be some thing less than that required to entitle her to a divorce, and, therefore, less than that which would be necessary to furnish a bar to her husband's libel for her misconduct, if pleaded by way of ⁴⁶⁹ recrimination: See *Sturbridge v. Franklin*, 160 Mass. 149. Although ordinarily the question whether she was guilty of adultery would be important evidence on the issue tried in the probate court, the husband might offer to forgive her if she would return, or for other reasons the decision might be made to rest on grounds which would not involve a finding that she was innocent or guilty of that crime. It follows that the judgment of the probate court is not conclusive against the libelant in the present action, and there must be a new trial.

Exceptions sustained. —

MARRIAGE AND DIVORCE—EFFECT OF AGREEMENT TO LIVE APART.—The fact that a husband and wife live apart by mutual agreement is no bar to a suit for divorce brought by either of them against the other for adultery: *Franklin v. Franklin*, 154 Mass. 515; 26 Am. St. Rep. 266; *Clark v. Fosdick*, 118 N. Y. 7; 16 Am. St. Rep. 733, and note. Desertion on the part of the plaintiff is no bar to an action for divorce on the ground of adultery: *Richardson v. Richardson*, 4 Port. 467; 30 Am. Dec. 538. In an action by a wife for divorce for cruelty, an agreement for separation, made two years previous, after the acts of cruelty, and after actual separation, and substantially complied with by the husband, is a valid defense: *Squires v. Squires*, 53 Vt. 208; 38 Am. Rep. 668, and especially note.

RES JUDICATA.—A dismissal of a libel for divorce after a hearing upon the merits, and which dismissal may have been decreed upon any one of

three different and sufficient defenses, is conclusive as to neither of them, and is not a bar to a libel by the former libelee as libelant, against the former libelant as libelee: *Lea v. Lea*, 99 Mass. 493; 96 Am. Dec. 772, and see the extended note thereto.

WALSH v. NEW YORK AND NEW ENGLAND RY. CO.

[160 MASSACHUSETTS, 571.]

CONFLICT OF LAWS.—IF A CAUSE OF ACTION ARISES IN ONE STATE under the common law as there understood and administered, it may be enforced in another state though it does not constitute a cause of action by the law of the latter state, where the variance in the laws of the states does not amount to a fundamental difference of policy. Hence, if personal injuries sustained in another state, and for which the plaintiff seeks to recover in this state, were suffered under circumstances such that in this state they would be attributed to the negligence of a fellow-servant, and recovery against the common employer denied, recovery therefor may be had in this state if by the law, as understood in the state where the injuries were so received, they are not attributed to the negligence of the fellow-servant, but are regarded as the result of a wrong for which the master is answerable.

F. A. Farnham, for the defendant.

C. G. Fall, for the plaintiff.

571 HOLMES, J. This is an action of tort to recover for a personal injury suffered by the plaintiff in Connecticut. The injury was caused by a broken drawbar on a foreign freight-car, which did not belong to the defendant. Whether the defendant was using it, or, as we suppose, simply was forwarding it, is not stated. The plaintiff testified, and we assume, that it was customary to inspect freight trains at certain points named, and the evidence tended to show that the injury was due to the negligence of the inspectors at one of those points. In other words, the regulations of the defendant were sufficient, so far as appears, and the only wrong was the negligence of the inspector on the particular occasion seemingly in omitting to inspect the train. The court ruled, in substance, that, under the Massachusetts decisions, if the accident had happened here the injury would have been regarded as due to the negligence of a fellow-servant, and the plaintiff could not have recovered. This was not excepted to: *Mackin v. Boston etc. R. R. Co.*, 135 Mass. 201, 206; 46 Am. Rep. 456; *Coffee v. New York etc. R. R. Co.*, 155 Mass. 21, 24, 25.

Certain extracts from the case of *McElligott v. Randolph*, 61 Conn. 157, 161, 162, 164, 29 Am. St. Rep. 181, were put in evidence. The judge ⁵⁷² ruled that the jury was authorized to find that the law of Connecticut was different from that of Massachusetts in this respect, and that, if by the law of Connecticut the plaintiff could maintain his action there, a verdict might be found for him here. These rulings were excepted to by the defendant. With regard to the former, we have some hesitation. The extracts from the Connecticut case, taken by themselves, state nothing that might not be laid down in Massachusetts; for instance, in explaining the personal duty of a master to see that reasonable care is exercised to provide reasonably safe machinery: *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240, 260; 14 Am. Rep. 598, is one of the cases cited as authority for the propositions. Others are *Hough v. Railway Co.*, 100 U. S. 213, citing the same case, and *Davis v. Central Vermont R. R. Co.*, 55 Vt. 84; 45 Am. Rep. 590, citing and relying on *Holden v. Fitchburg R. R. Co.*, 129 Mass. 268; 37 Am. Rep. 343. But in *McElligott v. Randolph*, 61 Conn. 157, 29 Am. St. Rep. 181, the facts give a somewhat different complexion to the language used. The accident in that case happened in taking down a wheel, and was assumed to be due to the fact that the superintendent had gone home. Superintendence was necessary in order that the work should be done safely, and it was held that the defendants had not done their whole duty in furnishing a competent superintendent, but that they were bound to see that oversight was exercised. The case is not exactly in point, but it seems to us that the argument is much stronger for the proposition that reasonable inspection of foreign cars is one of the duties which a railroad is bound to see performed, and that the decision affords some ground for the inference that the Connecticut courts would adopt that proposition.

If, however, we assume, as was ruled, and as we do assume, that if the accident had happened in this state the plaintiff could not have recovered, it is argued that he cannot recover now. A decision in Wisconsin and language from some English cases are cited which more or less favor this contention: *Anderson v. Milwaukee etc. Ry. Co.*, 37 Wis. 321; *The Halley*, L. R. 2 P. C. 193, 204; *Phillips v. Eyre*, L. R. 6 Q. B. 1, 28, 29; *The M. Moxham*, 1 P. D. 107, 111. Possibly, when

it becomes material to scrutinize the question more closely, the English law will be found to be consistent with our views. But however this may be, we are of opinion that, as between ⁵⁷³ the states of this union, when a transitory cause of action has vested in one of them under the common law, as there understood and administered, the mere existence of a slight variance of view in the forum resorted to, not amounting to a fundamental difference of policy, should not prevent an enforcement of the obligation admitted to have arisen by the law which governed the conduct of the parties: See *Higgins v. Central New England etc. R. R. Co.*, 155 Mass. 176; 31 Am. St. Rep. 544. It is unnecessary to consider whether we should be prepared to adopt in its full extent what is thought by the learned editor of Story on Conflict of Laws, eighth edition, section 625, note *a*, to be the true doctrine—that “whether the domestic law provides for redress in like cases should in principle be immaterial, so long as the right is a reasonable one, and not opposed to the interests of the state.” The cases cited, *Dennick v. Railroad Co.*, 103 U. S. 11, and *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48, 38 Am. Rep. 491, go further than the decisions of this state: *Richardson v. New York Cent. R. R. Co.*, 98 Mass. 85. The policy of the supposed Connecticut rule cannot be said to be opposed to that prevailing here, even apart from statute: See Stats. 1893, c. 359.

Exceptions overruled. —

CONFLICT OF LAWS—RIGHT OF ACTION FOR NEGLIGENCE UNDER LAWS OF ANOTHER STATE.—This question will be found discussed in *Higgins v. Central New England etc. R. R. Co.*, 155 Mass. 176; 31 Am. St. Rep. 544; and *Alabama etc. R. R. Co. v. Carroll*, 97 Ala. 126; 38 Am. St. Rep. 163, and the notes thereto wherein the cases in this series will be found collected; also the extended note to *Atrill v. Huntington*, 14 Am. St. Rep. 361.

CASES
IN THE
SUPREME COURT
MICHIGAN.

LUCAS v. MICHIGAN CENTRAL RAILROAD CO.

[98 MICHIGAN, 1.]

RAILROADS—EJECTION OF PASSENGERS—DAMAGES.—A passenger on a railroad who receives a check from the conductor on the surrender of his ticket, and then goes into another car, where his fare being again demanded he fails to produce his check, claiming that none was given, and upon his refusal to go into the other car for identification is ejected from the train cannot recover therefor.

RAILROADS—EJECTION OF PASSENGER—EXEMPLARY DAMAGES.—A passenger on a railroad train who receives no check on surrendering his ticket, and then goes into another car, where his fare being again demanded he informs the conductor of the facts, and offers to go into the other car for identification, which offer the conductor refuses to accept, ejecting him from the train on a dark night remote from his home or a station is entitled to recover not only actual damages but also additional damages for whatever injury to his feelings or of indignity, pain, and disgrace such conduct tends to produce in view of the time, place, and circumstances; but it is error to instruct the jury that he is entitled to exemplary damages without explaining that term.

EXEMPLARY DAMAGES.—AN INJURY INTENSIFIED BY MALICE OR WILLFULNESS, or the oppressiveness or recklessness of the act, authorizes a recovery of damages commensurate with the injury when these elements are present, and as the added injury in consequence of their presence is not always susceptible of proof the matter is left to the sound discretion of the jury, but its attention should be called to the elements to be considered in this class of cases, and it should be cautioned against acting upon improper motives.

PRINCIPAL AND AGENT—EXEMPLARY DAMAGES.—If any wantonness or mischief on the part of an agent, acting within the scope of his employment, causes an additional injury in body or mind the principal is liable to make compensation for the whole injury suffered.

Henry Russel and Ashley Pond, for the appellant.

Dickinson, Thurber, and Stevenson, for the respondent.

• McGRATH, J. Plaintiff purchased an excursion ticket at Dexter, good to Detroit and return, and rode to Detroit thereon. At about eight o'clock on the evening of the same day he took the train at Detroit for Dexter, taking a seat in the smoking-car. When a few miles out of Detroit the conductor took up his ticket. When the train arrived at Ypsilanti plaintiff left the smoker and took a seat in a regular passenger car. After the train left Ypsilanti the conductor came to plaintiff and demanded his fare. Plaintiff informed him that he had given him his ticket in the other car. The conductor then asked him for his check. Plaintiff replied that he had not been given a check. The conductor threatened to put him off, but did not at that time, but told him that he would have to pay his fare, or get off at Ann Arbor. Plaintiff responded that he had surrendered his ticket, and would not pay his fare. After the train left Ann Arbor the conductor returned, and, plaintiff refusing to pay his fare, the conductor called the brakeman, and they together pulled plaintiff from his seat, took him through the car, and put him off, about one mile west of Ann Arbor and eight miles east of Dexter. Plaintiff testified that when his ticket was taken up no check was given him; that when the conductor came to him the second time, and again just before he was put off, he told the conductor that if he would go back with him into the smoking-car he would prove his assertions by the man who sat with him, but that the conductor told him that he had no time to ³ bother with him; that the conductor insisted that he (plaintiff) had gotten on at Ypsilanti; that he was ejected from the car by force at about ten o'clock at night; that the night was very dark; that he could not even see the fences on either side of the track, and that he was compelled to walk home. It was not claimed on the trial that plaintiff had not surrendered a ticket, but the conductor insisted that he had given him and all of the excursionists checks; that he told plaintiff that if he would bring one man that knew him that said he came from Detroit it would be all right, but he would not do that; that he used no force in ejecting him; and denied that plaintiff had requested him to go into the smoking-car for the purpose of identification. One of plaintiff's witnesses, who was in the smoker, testified that the conductor gave plaintiff no check when the ticket was taken up. Another witness who was in the car from which plaintiff was ejected testified that she was an excursionist,

as were others who were with her; that no checks were given to her or the other excursionists with her; and that she heard plaintiff say to the conductor, that if he would go into the smoking-car with him (plaintiff) he could prove that he got on at Detroit, and had given up his ticket, and the conductor refused to go. Plaintiff had a verdict for twelve hundred dollars, and defendant appeals.

The alleged errors relate to the refusal of requests to charge, and to the instructions given on the question of damages.

The defendant was entitled to have the jury instructed as to the law applicable to its version of the case. After the surrender of his ticket plaintiff had left his seat in the smoking-car and taken a seat in another car. If plaintiff received a check from the conductor, and, when his fare was demanded, did not produce the check, and, when requested, refused to go into the other car for identification he could not recover. The check, if given, was given him for the very purpose of identification. It was notice to him that the conductor would rely upon its production, and not upon recollection.

The defendant was entitled to the instruction that there was no evidence of malicious intention on the part of the conductor; but, under the circumstances of this case, if the jury believed the testimony introduced on behalf of plaintiff, the plaintiff was entitled to recover not only those damages which are ordinarily termed "actual damages" but for whatever injury to his feelings or of indignity, pain, and disgrace such conduct would tend to produce in view of the time, place, and circumstances. Conduct may be so hasty and ill-timed, and so far disregard proper precaution and the rights of others, as to be reckless and oppressive, and the law regards recklessness and oppression as aggravating the injury: *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447, 455; *Josselyn v. McAllister*, 22 Mich. 310; *Kreiter v. Nichols*, 28 Mich. 499; *Elliott v. Herz*, 29 Mich. 202; *Kehrig v. Peters*, 41 Mich. 475; *Ross v. Leggett*, 61 Mich. 445; 1 Am. St. Rep. 608. If plaintiff's legal rights were violated by the expulsion from the train, it was for the jury to consider the injury to his feelings that such conduct would be likely to produce, in view of his consciousness that he was without fault, and had a right to remain upon the train to his destination: *Chicago etc. R. R. Co. v. Flagg*, 43 Ill. 364; 92 Am. Dec. 133; *Carsten v. Northern Pac.*

R. R. Co., 44 Minn. 454; 20 Am. St. Rep. 589; *Philadelphia etc. R. R. Co. v. Rice*, 64 Md. 63; *Chicago etc. R. R. Co. v. Holdridge*, 118 Ind. 281. It was expressly held in *New York etc. R. R. Co. v. Winter*, 143 U. S. 60, that, if plaintiff was rightfully on the train as a passenger, he had the right to refuse to be ejected from it, and to make a sufficient resistance to being put off to denote that he was being removed by compulsion, and against his will; and the fact that under such circumstances he was put off the train was of itself ⁵ a good cause of action against the company. Defendant's belief cannot be held to justify unreasonable or reckless conduct: *Welch v. Ware*, 32 Mich. 77; *Raynor v. Nims*, 37 Mich. 34; 26 Am. Rep. 493.

The court was in error, however, in instructing the jury that plaintiff was entitled to exemplary damages, in the absence of any explanation as to what was meant by that term: *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447. The court had already instructed the jury that plaintiff was entitled to recover as actual damages for such pain and mortification and disgrace as the act entailed, and then informed the jury that if plaintiff made a proposition to the conductor to step back into the other car and allow him to prove that he got on at Detroit, and surrendered his ticket, then he was entitled to recover, in addition to his actual damages, what the law calls "exemplary damages." The jury were left free to add to the amount which they found that plaintiff had suffered from mortification, pain, and disgrace a further sum as a punishment. The aim of law which gives redress for private wrongs is compensation to the injured rather than the prevention of a recurrence of the wrong. The law recognizes the fact that an injury may be intensified by the malice or willfulness, or oppressiveness or recklessness, of the act, and simply allows damages commensurate with the injury when these elements are present. The added injury, in consequence of their presence, is not always susceptible of proof, hence the matter is left to the sound discretion of the jury. Courts, however, should call attention to the elements that should be considered by juries in this class of cases, and caution them from acting upon improper theories: *Josselyn v. McAllister*, 22 Mich. 310; *Scripps v. Reilly*, 38 Mich. 10; *Stilson v. Gibbs*, 53 Mich. 280; *Wilson v. Bowen*, 64 Mich. 133.

It is urged that the defendant is not liable in exemplary damages for the oppressive or reckless conduct of the con-

ductor, ^c and *Lake Shore etc. Ry. Co. v. Prentice*, 147 U. S. 101, is relied upon. In that case the act was wholly without the line or scope of the conductor's authority, and the court expressly recognize the rule that, if any wantonness or mischief on the part of an agent, acting within the scope of his employment, causes additional injury to the plaintiff in body or mind, the principal is liable to make compensation for the whole injury suffered, and a number of cases are cited in support of the doctrine.

For the errors mentioned, the judgment is reversed, and a new trial ordered.

The other justices concurred.

RAILROADS.—EXPULSION OF PASSENGERS WHO HAVE PAID FARE: See *Gorman v. Southern Pac. Co.*, 97 Cal. 1; 33 Am. St. Rep. 157, and note; *Kansas City etc. R. R. Co. v. Riley*, 68 Miss. 765; 24 Am. St. Rep. 309, and note; and *Spellman v. Richmond etc. R. R. Co.*, 35 S. C. 475; 28 Am. St. Rep. 858.

DAMAGES—EXEMPLARY—WHEN ALLOWED.—When a cause of action is an invasion of the rights or property of a person, natural or artificial, characterized by violence, fraud, malice, wantonness, or a reckless disregard of social or civil rights, exemplary damages may be recovered: *Spellman v. Richmond etc. R. R. Co.*, 35 S. C. 475; 28 Am. St. Rep. 858, and extended note; *Samuels v. Richmond etc. R. R. Co.*, 35 S. C. 493; 28 Am. St. Rep. 883; *Pearson v. Zehr*, 138 Ill. 48; 32 Am. St. Rep. 113. See, also, the note to *Northern etc. Ry. Co. v. O'Conner*, 35 Am. St. Rep. 430.

RAILROADS.—EXPULSION OF PASSENGER—EXEMPLARY DAMAGES.—Exemplary damages may be allowed by a jury in an action for the wrongful expulsion of a passenger from its train, if in such expulsion the defendant was guilty of oppression, fraud, or violence, actual or presumed: *Gorman v. Southern Pac. Co.*, 97 Cal. 1; 33 Am. St. Rep. 157, and note; *Spellman v. Richmond etc. R. R. Co.*, 35 S. C. 475; 28 Am. St. Rep. 858, and extended note; *Southern etc. Ry. Co. v. Rice*, 38 Kan. 398; 5 Am. St. Rep. 766.

AGENCY—PRINCIPAL'S LIABILITY FOR WANTONNESS OF AGENT.—A principal, whether a corporation or an individual, may be held liable in exemplary damages to a third person on account of a wrongful, wanton, or malicious act of his agent, done within the scope of his agency, though the act was not previously authorized or subsequently ratified by the principal: *Rucker v. Smoke*, 37 S. C. 377; 34 Am. St. Rep. 758, and note, with the cases collected.

JENKS v. PAWLOWSKI.

[98 MICHIGAN, 110.]

DEEDS.—RESTRAINING COVENANTS in a deed upon the right of the grantee to sell intoxicating liquors on the premises are valid, upon the theory that the grantor has a right, in disposing of his property, to prevent such a use by the grantee as may diminish the value of the remaining land or impair its eligibility for other uses.

DEEDS—RESTRAINING COVENANTS—WAIVER BY GRANTOR.—When a grantor conveys one parcel of land, with restrictions in the deed upon the right of the grantee to sell intoxicating liquors on the premises, and afterwards conveys adjoining land to a third person without such restrictions, he waives the right to insist upon the enforcement of the restrictions contained in the first deed, even though they were omitted from the second deed by mistake, if no proceeding has been taken to correct such mistake.

John F. Murphy and William T. Mitchell, for the appellants.

Elbridge F. Bacon, for the respondent.

110 McGRATH, J. This is a bill to enjoin the sale of intoxicating liquors upon premises in the village of Sand Beach, **111** conveyed by complainant and another to Frank Pawlowski's grantor by deed dated October 2, 1883, which contained the following provision:

"This conveyance and estate in the said premises hereby created is subject to the express condition that if the said party of the second part, their heirs or assigns, shall at any time sell, or keep for sale, or knowingly permit any person under them so to sell, or keep for sale, any spirituous or intoxicating liquors, whether distilled or fermented, the entire title and estate in and to said premises hereby conveyed and created shall cease, and the title in and to said premises shall thereupon at once revert to and vest in the parties of the first part, their heirs and assigns, forever, and it shall then be lawful for the said parties of the first part, their heirs or assigns, to re-enter upon said premises, and said party of the second part, their heirs or assigns, and every person claiming under him or them, wholly to remove, expel, or put out."

Prior to the date of the deed in question complainant had conveyed several parcels of land in the village to other parties without restriction. The last of these deeds was dated May 20, 1883. It also appears that on January 24, 1885, complainant conveyed a parcel of land adjoining the premises in question to one Lowry, by deed, without restriction, and that Lowry, from 1888, and down to the time of the hearing, has

kept a liquor saloon upon the premises so conveyed. Defendant Frank Pawlowski operated a meat market on his premises until August, 1891, since which time his son has kept a saloon therein. Until years after the establishment of the Lowry saloon defendant had observed the conditions of his deed.

Restrictions of this class are sustained upon the theory that a party has the right, in disposing of his property, to prevent such a use by the grantee as might diminish the value of remaining land, or impair its eligibility for other uses: *Watrous v. Allen*, 57 Mich. 362; 58 Am. Rep. 363; *Smith v. Barrie*, 56 Mich. 314; 56 Am. Rep. 391. But is there no mutuality in such agreements? It certainly cannot be said that a grantor has the right ¹¹² afterwards to sell an adjoining lot without restrictions, and thereby diminish the value of his former grantee's property, and impair its eligibility for other uses, converting the locality into a saloon locality, and still be allowed to insist upon the restriction. The damage to defendant's property by the permission and existence of Lowry's saloon is quite as apparent as that to complainant by reason of his ownership of a hotel and his residence in the same block: *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36; 13 Am. St. Rep. 420.

It is no answer to say that the omission of the restriction in the deed to Lowry was a mistake. The consequences are the same to defendants. No proceedings have been taken to correct such mistake.

The decree below must be reversed and the bill dismissed.

HOOKEE, C. J., concurred in the result.

DEEDS—RESTRICTIONS—INTOXICATING LIQUORS.—A condition that "intoxicating liquors shall never be sold as a beverage to be drunk on the premises, and if the same is so done habitually, with the knowledge and consent of the owner, this instrument shall be void," if inserted in a conveyance of real property, is a valid condition subsequent, the breach of which works a forfeiture of the premises conveyed: *Sioux City etc. R. R. Co. v. Singer*, 49 Minn. 301; 32 Am. St. Rep. 554, and note. To the same effect, see *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36; 13 Am. St. Rep. 420, and note; and *Bad River Lumbering etc. Co. v. Kaiser*, 82 Wis. 166.

MILLER v. MINOR LUMBER COMPANY.

[98 MICHIGAN, 163.]

COMPOUNDING CRIME—EMBEZZLEMENT—RIGHT TO RECEIVE MONEY IN PAYMENT FOR.—A master has the right to receive money from his servant or from the wife of the latter, or from a third person, in payment for money embezzled by such servant, so long as the master does not promise, either expressly or by implication, not to prosecute for the crime.

DURESS—RATIFICATION.—A deed from a wife, secured through threats of a criminal prosecution against her husband for embezzlement from the grantee, is not void, but only voidable, and if she subsequently executes a quitclaim deed to the same premises upon a sufficient consideration, and with knowledge that she thereby waives her right to avoid the first deed, she ratifies it, and is estopped from having either or both deeds set aside in the event that her husband is prosecuted for embezzlements discovered after the execution of the second deed.

J. D. Turnbull, for the appellant.

William E. Depew and Frank Emerick, for the respondents.

¹⁶³ **HOOKE**, C. J. The complainant's husband, being in ¹⁶⁴ the employ of the Minor Lumber Company, embezzled about ten thousand dollars of the employer's money. The fact that he was the embezzler of a small amount was accidentally discovered by a member of the company, and Miller admitted the fact, and confessed to other instances. The services of one O'Neil, a private detective, were secured, and Miller was kept in his custody. He was not arrested, and remained with O'Neil by consent, but it was undoubtedly understood by all that he was not to be suffered to depart. Miller gave up over four thousand dollars of the money, which left a shortage of about six thousand dollars. He then proposed to go to Battle Creek and have his wife deed to the company a house and lot in Alpena, the title to which was in her. The deed was drawn, and he was permitted to go with O'Neil to Battle Creek, where they found complainant at the sanitarium, in bed, having just undergone a surgical operation. She reluctantly gave the deed. The parties differ as to what occurred there, but we are satisfied that while no express promise was given by the defendants that Miller should not be prosecuted, it was so understood by complainant, and but for that understanding the deed would not have been given, and that had not the deed been given, Miller would have been prosecuted. Subsequently complainant returned to her home in Alpena, with the intention of surrendering the premises to the defendants, and opened negotiations with them for the sale of her fur-

niture, which was in the house, in the course of which she said that she had been informed that she could have the deed set aside. The defendants finally agreed to purchase the furniture for eleven hundred dollars, on condition that she would execute a quitclaim deed of the premises, which she was informed would cut off any right she might have in the same. She stated that she did not intend to try to get the property back, and signed the deed and bill of sale, and received eleven hundred dollars in cash from the defendants. This second deed ¹⁶⁵ was made in April, the first having been made in February. Up to this time Miller had not returned to Alpena, but did so a short time after the second deed was given. Mrs. Miller remained in the house for a time, and then yielded the possession. It was subsequently discovered that Miller was guilty of still further embezzlements, for which he was arrested at the instance of the defendants. What occurred in relation to these proceedings is not very clear, but some correspondence passed between Mrs. Miller and Mr. Kelley as follows:

"ALPENA, October 4, 1887.

"*Mrs. W. J. Miller,*

"DEAR MADAM: I have succeeded in getting the paper you wanted signed by Mr. Maltz, but not in time to take same to the train this morning, as was understood by myself and A. N. S.; therefore I will retain same until he, A. N. S., returns, and then have it signed and delivered to you in accordance with our understanding.

"Yours respectfully,

"R. J. KELLEY."

"As individuals or as members of the Minor Lumber Co., we will not pursue or press the prosecution instituted against W. J. Miller at Alpena, and will put nothing in his way to prevent him from earning an honest living.

[SIGNED] GEORGE L. MALTZ.

"A. N. SPRATT.

"Dated October 3, 1887."

It appears in evidence that this was not the first time that Miller had been guilty of a crime of this character, and that his wife on several occasions had come to his relief. A year or two after the deed was given she commenced these proceedings.

We have no hesitation in saying that the transaction at Battle Creek was such as to render the deed there taken void-

able on the ground of duress. The complainant was sick and excited. All her previous experiences may be supposed to have prepared her mind for such charges, and it is manifest that she would cling to her husband, and ¹⁶⁶ was prepared to aid him in his trouble under the pressure of his importunities, which were supported by the presence of the officer who had him in his custody. We are also convinced that the deed would not have been executed at that time had she not expected that he would not be prosecuted. There is little doubt that the officer so understood it, and, perhaps, as little of the intention of the defendants to forbear, if the deed were procured, though they at all times refused to promise any thing of the kind. While no promise was made, this understanding contributed to influence the complainant.

The second deed was given under different circumstances. Miller evidently understood that he was unsafe in the state, and sojourned for a time in Canada, where the complainant was with him for a couple of weeks or more. We must believe that she was aware that he had no promise of immunity when she returned to Alpena, and she went there to carry out her promise by disposing of her furniture, and yielding possession of the premises under the Battle Creek deed. She importuned the defendants to buy it, and, by language which seems to have partaken of the nature of a threat, informed them that she was advised that the deed could be set aside. Apparently, this was intended to make them more willing to purchase the furniture, and it seems to have had that effect, for Spratt at once told her that, in view of that, he should require a new deed if he bought the furniture; and there can be no doubt that he would have refused to buy it had he not supposed that the company was to hold the real estate. The subject was mentioned between herself and Kelley, being introduced by her, when she was informed that she might be able to set aside the deed, but that, if she made the sale of the furniture, and gave a new deed, as required by the company, it would preclude a recovery of the premises. She made haste to close the transaction, and ¹⁶⁷ obtained the money for the furniture. We think that she thereby parted with any right that she had in the premises. The Battle Creek deed was not absolutely void, but at most voidable, at her option. By this last transaction she saw fit to ratify it, and elected to consider it valid. Whatever want of free agency there may have been in her act at Battle

Creek, there was no duress or coercion at Alpena. Her husband was then in safety, being out of the country. She had time and opportunity to consider the matter. She was advised of her rights, and knew what she could do, and deliberately chose the course taken. She was no novice in such matters, and may have felt that it was but just to the company to surrender to it property which was perhaps paid for with its money. The letter sent by Maltz and Spratt, dated October 3d, in which they stated that they would not press the present prosecution, is not shown to have been connected with the sale of the furniture in April. It does not appear how the letter was procured. It appears that the defendants never promised not to prosecute for the things then discovered; that on all occasions they refused to make such a promise. They had the right to receive money from Miller in payment, and from his wife or any other person by Miller's procurement, so long as they did not transgress the law, by promising, either expressly or by implication, not to prosecute.

The decree will be affirmed.

The other justices concurred.

COMPOUNDING FELONY—RIGHT OF INJURED PARTY TO COMPENSATION.—

The owner of property stolen or wrongfully taken has a right to receive compensation for the injury sustained, and unless he agrees not to prosecute or suppress evidence of the crime, the defense of compounding a felony is not available against him: *Cass County Bank v. Bricker*, 34 Neb. 516; 33 Am. St. Rep. 649, and note; *Johnston v. Allen*, 22 Fla. 224; 1 Am. St. Rep. 180, and note. A note given to settle an agent's embezzlement is valid if there is not an agreement to stifle the prosecution: *Wolf v. Trozell*, 94 Mich. 573. See, also, the extended notes to *Town of Hinesborough v. Summer*, 31 Am. Dec. 603, and *Hill v. Freeman*, 49 Am. Rep. 49.

DURESS—RATIFICATION.—A contract made under duress is voidable, but if ratified after the duress has ceased it becomes valid and enforceable: *Ferrari v. Board of Health*, 24 Fla. 390; *Belote v. Henderson*, 5 Cold. 471; 98 Am. Dec. 432.

LINNEMAN v. MOROSS.

[98 MICHIGAN, 178.]

CONTRACT FOR BENEFIT OF THIRD PERSON—PRIVITY—NOVATION.—An agreement between father and son, to which a daughter is a stranger, that in consideration of the revocation by the father of his will in favor of such daughter, and the devise of the same property to such son, the latter is to pay her a certain sum monthly, so long as she shall live, cannot be enforced by her in an action at law. Such agreement cannot be enforced on the law side of the court, either on the ground of novation or as a trust.

CONTRACT FOR BENEFIT OF THIRD PERSON—PRIVITY.—A promise made by one person to another for the benefit of a third, who is a stranger to the consideration, cannot be enforced by the latter.

APPEAL from the disallowance of a claim against the estate of a deceased person.

Wells, Angell, Boynton, and McMillan, for the appellant.

Emery T. Wood, Edwin C. Bolton, and Moore and Moore, for the respondent.

178 LONG, J. This claim is for the payment of ten dollars per month from October 15, 1874, to April 16, 1890. It **179** involves a contingent claim for a like amount, monthly, so long as claimant lives. The commissioners on claims rejected it. Claimant appealed to the circuit court, and succeeded. The estate brings error.

The claimant and deceased were brother and sister, children of Antoine Moross. The claim is based upon a contract alleged to have been made in 1871 between Antoine and Joseph for the benefit of the claimant. Some time prior to 1871 Antoine Moross made a will, in which he gave Nancy, for life, twenty acres of land and two hundred dollars in money. In April, 1871, he made a codicil to the will, whereby he revoked the gift to Nancy, and gave to Joseph what in the original will had been given to Nancy, stating before the revoking clause: "I have since made other provision for her maintenance during her natural life." Antoine died soon after. In 1875 Joseph conveyed to Nancy the land which had been originally devised to her, and she gave to Joseph, on the same day the following receipt:

"MT. CLEMENS, February 15, 1875.

"Received of Joseph A. Moross deed of N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, sec. 26, town 2 north, range 13 east, in Macomb county, in full settlement of all claims between us.

"Witness:

"O. Chapoton."

ANN ^{her} X LINNEMAN."
mark

It was established on the trial that Joseph promised Antoine, when the codicil to the will was made, that he would pay the ten dollars per month to Nancy so long as she lived. It was also shown that Joseph for a time paid Nancy the ten dollars per month, which she accepted; also, that in 1874 Nancy sued Joseph on this contract, and recovered judgment. But it was contended in behalf of the estate that the conveyance of the twenty acres of land to Nancy was in full settlement of the claim. It was also contended:

1. That no liability attached under the provisions of the codicil and the promise of Joseph to his father to make ¹⁸⁰ the payments to Nancy, as Nancy was a stranger to that contract and to the consideration for the promise; 2. That Nancy was guilty of laches.

On the other hand, it was also contended by claimant's counsel, on the trial below, that the claimant did not have sufficient intelligence to comprehend the alleged settlement.

The court directed the jury, substantially, that if they found that a contract was entered into between Antoine and Joseph to pay Nancy this sum, and that Nancy, when she made this settlement, was incapable of contracting, by reason of not having sufficient intelligence to understand its terms and conditions, the verdict must be for claimant for the contract price, less the value of the land deeded to her by Joseph. The court was asked by the estate to charge:

"This action is based upon a contract made between Joseph A. Moross, deceased, and his father, Antoine Moross, deceased, to which Mrs. Linneman was not a party. Mrs. Linneman, being a stranger to the contract and to the consideration thereof, can maintain no action upon it."

This request was refused, and the jury found a verdict in favor of claimant for seven hundred and forty-two dollars and thirty-three cents.

The court should have given the request of defendant's counsel in his charge to the jury. There is no evidence that Nancy was a party to the contract between Antoine and Joseph. Antoine, by his will, gave Nancy certain property and money. He afterwards, by codicil, revoked the gift to Nancy, and made the same property over to Joseph, upon Joseph's promise to pay Nancy this monthly indemnity. No consideration moved from Nancy, and we think the case falls within the rule that a promise made by one person to another for the benefit of a third—a stranger to the consideration—will not

support an action by the latter. This rule is settled in this state in *Pipp v. Reynolds*, 20 Mich. 88; *Turner v. McCarty*, 22 Mich. 265; ¹⁸¹ *Hicks v. McGarry*, 38 Mich. 667; *Hunt v. Strew*, 39 Mich. 368; *Hidden v. Chappel*, 48 Mich. 527; *Edwards v. Clement*, 81 Mich. 513; *Wheeler v. Stewart*, 94 Mich. 445. In the last-mentioned case it appeared that plaintiff's husband, in his lifetime, agreed with defendant to buy a one-third interest in the latter's farm, and to work it, and if he died before his interest was paid for, the value of his services was to be paid to his widow, and the payments made were to be refunded. The husband died, and the widow, in her individual capacity, brought suit to recover the value of the services, and the amount which should have been refunded. It was held that she could not recover.

Counsel for claimant attempt to place the right of recovery on the ground of novation. It lacks the essential elements of a novation. Nancy had no claim against her father's estate which she could enforce, and it does not appear that she was ever consulted when her father revoked the gift to her, and made the property over to Joseph. She released nothing. She had nothing to release. Claimant's counsel cite *Osborn v. Osborn*, 36 Mich. 48, and some other cases in this court, to sustain the proposition that the transaction was a novation; but in *Osborn v. Osborn*, 36 Mich. 48, it was said by this court:

"The circuit judge thought the case came within the principle of *Pipp v. Reynolds*, 20 Mich. 88; *Turner v. McCarty*, 22 Mich. 265; and *Halsted v. Francis*, 31 Mich. 113. In each of those cases the plaintiff counted on a promise made to a third person—not to himself. In this case the plaintiff counts upon a promise made to herself, and the only question is whether she establishes it."

Counsel also contend that, even though Nancy was a stranger to the contract, a trust was created in her favor which might be enforced; that the court would compel the representatives of Antoine to permit the use of their names for the purpose of recovering from Joseph's estate the fund for the benefit of Nancy, or that Antoine's representatives ¹⁸² could enforce the contract, on their own motion, for the benefit of Nancy. This may be true, and yet this action not maintainable. Here the claimant, in her own name, seeks in a court of law to enforce the payment under a contract to which she was never a party, and for which the consideration

moved from another. If it can be enforced as a trust, even by the claimant, she is in the wrong forum for that purpose. These proceedings are in the nature of an action at law, where questions of fact are triable by a jury; and the question of whether it was a trust fund in the hands of Joseph, which, in equity, he should pay over to Nancy, could not be litigated in this forum. It may be true that Joseph took the property from his father under this will, with a promise to pay Nancy these several sums of money, and that a court of equity would, under proper proceedings, enforce it for her benefit. When that question shall arise the proper forum will have an opportunity to pass upon the question of Nancy's competency to make the claimed settlement, and the matter of her laches in not bringing the action sooner for the enforcement of the trust. Until these questions shall arise in a proper proceeding we express no opinion upon them.

The judgment of the court below must be reversed. No new trial will be ordered.

The other justices concurred.

PROMISE FOR THE BENEFIT OF THIRD PERSON.—This topic has been discussed in notes to *Schemerhorn v. Vanderheyden*, 3 Am. Dec. 305-307; *Arnold v. Lyman*, 9 Am. Dec. 155-157; *Tuttle v. Catlin*, 12 Am. Dec. 693, where the rule is correctly stated to be that the prevailing doctrine in this country is, that a parol or written promise from one person to another for the benefit of a third enables such third person to maintain an action on the promise, if adopted by him, though he was not cognizant of it when it was made, and no consideration moved from him. This view of the subject has been expressly adopted by the supreme court of the United States in *Hendrick v. Lindsay*, 93 U. S. 143, and meets with the approval of text-book writers: 2 Wharton on Contracts, sec. 785; 1 Parsons on Contracts, 467. In those jurisdictions where this rule maintains it is uniformly decided that when a contract, either oral or written, and not under seal, is entered into by two persons, for the sole benefit of a third, the latter may sue thereon in his own name, although the agreement may not be directly to or with him: *Moore v. House*, 64 Ill. 162; *Meyer v. Lowell*, 44 Mo. 328; *Joslin v. New Jersey Car Spring Co.*, 36 N. J. L. 141. In some jurisdictions it is maintained that if the contract is under seal it cannot be sued upon by the person for whose benefit it is made if he is not a party to the deed, but the suit must be brought in the name of the person with whom the covenant is made: *Moore v. Hense*, 64 Ill. 162; *Hendrick v. Lindsay*, 93 U. S. 143. It is the settled law of Wisconsin, that when one person for a valuable consideration engages with another, whether by simple contract or by covenant under seal, to do some act for the benefit of a third person, the latter may maintain an action against the promisor for a breach of the agreement: *Bassett v. Hughes*, 43 Wis. 319; *Hume v. Brower*, 25 Ill. App. 130. The prevailing doctrine that a third person, for whose benefit a promise or contract is made between others, may maintain an action for a breach thereof in his own name,

although he is a stranger thereto, and no consideration moves from him, has been much controverted, and is expressly repudiated by the courts of last resort in quite a number of the states. This is so in Michigan, as is shown by the principal case, and in *Wheeler v. Stewart*, 94 Mich. 445, it was decided that a widow could not maintain an action upon a contract of employment made with her husband, and by which, in case of his death, the payment for his services was to be made to her. The right to recover such payment belongs to his estate alone, citing on the general proposition that a promise made by one person to another for the benefit of a third, a stranger to the consideration, is not sufficient to support an action by the latter: *Pipp v. Reynolds*, 20 Mich. 88; *Hidden v. Chappel*, 48 Mich. 527; *Edwards v. Clement*, 81 Mich. 513; *Hunt v. Strew*, 39 Mich. 368. In *Edwards v. Clement*, 81 Mich. 513, it was decided that creditors could not recover upon an agreement made by third persons with the debtor to pay their claims, to which they were not parties, and which had not been assigned to them. The rule is also well established in Massachusetts, that a person not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and consequently, that a promise made by one person to another, for the benefit of a third, who is a stranger to the consideration, is not sufficient to support an action by the latter: *Exchange Bank v. Rice*, 107 Mass. 37; 9 Am. Rep. 1; *Rogers v. Union Stone Co.*, 130 Mass. 581; 29 Am. Rep. 478. A consideration for a promise moving from the promisee to a third person, but unknown to the promisor, is insufficient to support an action on the promise: *Ellis v. Clark*, 110 Mass. 389; 14 Am. Rep. 609. A son cannot recover on the ground of relationship upon a promise made for his benefit to his father, if the consideration for such promise moves wholly from the father: *Marston v. Bigelow*, 150 Mass. 45. A covenant to and with another and with such person as may be his wife at his decease to pay to his widow a share of the income of an estate cannot be enforced by the widow in a suit in her own name: *Saunders v. Saunders*, 154 Mass. 337. One to whom another has agreed with a third person to pay from funds in his hands a specific amount cannot maintain an action on the promise, unless he is a party to the contract, or some consideration moves from him: *Borden v. Boardman*, 157 Mass. 410. A stranger to a contract between others in which one of the parties promises to do some thing for the stranger's benefit cannot recover upon such promise in the absence of any consideration from him, or any duty or obligation to him on the part of the promisee: *Jefferson v. Asch*, 53 Minn. 446; *post*, p. 618; *Union Ry. etc. Co. v. McDermott*, 53 Minn. 407. A third person for whose benefit a parol contract is made cannot recover thereon (*Tuttle v. Catlin*, 1 Chip. D. 366; 12 Am. Dec. 691; *Ross v. Milne*, 12 Leigh, 204; 37 Am. Dec. 646), unless there is an executed gift, or he has paid a valuable consideration: *Ross v. Milne*, 12 Leigh, 204; 37 Am. Dec. 646. One not a party to a contract, and for whose benefit it was not expressly made, cannot maintain an action thereon, although such contract, if performed by the parties to it, would incidentally inure to his benefit: *Chung Kee v. Davidson*, 73 Cal. 522. As before stated, the general rule supported by the weight of authority is that a third person for whose benefit a promise or contract is made between two others, may sue thereon in his own name, whether the contract is parol or written, and though it is made or entered into without his knowledge, and no consideration moves from him: *Ellis v. Harrison*, 104 Mo. 270; *Lawrence v. Fox*, 20 N. Y. 268; *McDowell v. Laev*, 35 Wis. 175; *Miliani v. Tognini*, 19 Nev. 133; *Sacramento Lumber Co. v. Wagner*, 67 Cal. 293; *Schneider v. White*, 12 Or. 503; *Phillips v. Van Schaick*, 37 Iowa, 229;

West v. Western Union Tel. Co., 39 Kan. 93; 7 Am. St. Rep. 530; *State v. Laclede Gas Co.*, 102 Mo. 472; 22 Am. St. Rep. 789; *Dearborn v. Parks*, 5 Greenl. 81; 17 Am. Dec. 206; *Schemerhorn v. Vanderheyden*, 1 Johns. 139; 3 Am. Dec. 304; *McCarty v. Blevens*, 5 Yerg. 195; 26 Am. Dec. 262, where it was held that though the party to be benefited was an infant, yet he might maintain an action on the promise. To the same effect, *Benge v. Hiatt*, 82 Ky. 666; 56 Am. Rep. 912. Other cases sustaining the general rule are *Paducah Lumber Co. v. Paducah Water Co.*, 89 Ky. 340; 25 Am. St. Rep. 536; *Davis v. Calloway*, 30 Ind. 112; 95 Am. Dec. 671; *Barker v. Bradley*, 42 N. Y. 316; 1 Am. Rep. 521; *McCown v. Schrimpf*, 21 Tex. 22; 73 Am. Dec. 221; *Robbins v. Ayres*, 10 Mo. 538; 47 Am. Dec. 125; *Hind v. Holdship*, 2 Watts, 104; 26 Am. Dec. 107; *Barker v. Bucklin*, 2 Denio, 45; 43 Am. Dec. 726; *Brown v. O'Brien*, 1 Rich. 268; 44 Am. Dec. 254; *Machias Hotel Co. v. Coyle*, 35 Me. 405; 58 Am. Dec. 712; *Allen v. Thomas*, 3 Met. (Ky.) 198; 77 Am. Dec. 169; *Mumper v. Kelley*, 43 Kan. 256; *Burton v. Larkin*, 36 Kan. 246; 59 Am. Rep. 541; *Price v. Reed*, 38 Mo. App. 489; *Grant v. Diebold Safe etc. Co.*, 77 Wis. 72; *Hume v. Brower*, 25 Ill. App. 130; *Boals v. Nixon*, 26 Ill. App. 517; *Williamson etc. Paper Co. v. Seaman*, 29 Ill. App. 68; *Shamp v. Meyer*, 20 Neb. 223; *Beardslee v. Morgner*, 4 Mo. App. 139; *Barbaro v. Occidental Grove etc.*, 4 Mo. App. 429; *Porter v. Richmond etc. R. R. Co.*, 97 N. C. 46. A third party, for whose benefit a contract has been entered into for a valuable consideration, moving from the promisee, may maintain an action in his own name thereon or plead, by way of setoff, the damages arising from the nonperformance of the contract made for his benefit: *Lehow v. Simonton*, 3 Col. 346; *Green v. Richardson*, 4 Col. 584; *Green v. Morrison*, 5 Col. 18. One not a party to a contract, made for his benefit, can enforce his rights in equity against one, a party to the contract, who seeks to appropriate to the payment of the debt due him the property provided in such contract for the payments of debts, including a debt due him, to the exclusion of the party for whose benefit the contract was made: *Zell's Appeal*, 111 Pa. St. 532. When one promises to pay the indebtedness of another to a third person, the creditor of such other may maintain an action on the promise in his own name, though not a party to the agreement, and he need make no other acceptance of the contract than to bring the action for its enforcement: *Coypage v. Gregg*, 127 Ind. 359; *Davis v. Calloway*, 30 Ind. 112; 95 Am. Dec. 671; *National Bank v. Grand Lodge*, 98 U. S. 123; *Campbell v. Smith*, 71 N. Y. 26; 27 Am. Rep. 5; *Stariha v. Greenwood*, 28 Minn. 521; *Hume v. Brower*, 25 Ill. App. 130. An agreement between a client and a third person, upon a sufficient consideration, that the latter shall pay the former's attorney for his services may be enforced by such attorney in an action at law against the promisor: *Tyler v. Mayre*, 95 Cal. 160. A person to whom the consideration for a contract between two other persons is to be paid may maintain an action therefor in his own name, though he is a stranger to the contract, without its delivery to him at any time: *Stevens v. Flannagan*, 131 Ind. 122; and without an assignment of the right of action thereon: *Societa Italiana etc. v. Sulzer*, 139 N. Y. 469. An action for a breach of a contract made with one party to secure him for money loaned to a third person, for the primary benefit of such third person, may be maintained by the latter: *Larson v. Cook*, 85 Wis. 564. A minor child may maintain an action for damages for a breach of a contract made by a parent in his behalf: *Gooden v. Rayl*, 85 Iowa, 592; *Strong v. Marcy*, 33 Kan. 109. A third person may maintain an action in his own name upon a contract made expressly for his benefit when his release would

be a sufficient discharge to the promisor, but not when it would leave the latter liable in an action by the other contracting party: *Kountz v. Holthouse*, 85 Pa. St. 235. In Pennsylvania it is said to be "a rudimentary principle that a party may sue on a promise made on sufficient consideration for his use and benefit, though it is made to another and not to himself": *Merriman v. Moore*, 90 Pa. St. 78-81. In Indiana it has been said that "it has been many times decided that a promise made by one to another, from whom the consideration moves, for the benefit of a third, may be sued on by the party for whose benefit the promise was made": *Clodfelter v. Hulett*, 72 Ind. 137-141; *Carter v. Zenblin*, 68 Ind. 436. In Wisconsin, "by repeated decisions of this court, the persons for whose benefit the promise is made may maintain actions in their own names to enforce such promises: *Kollock v. Parcher*, 52 Wis. 393-400. In Missouri "it is well established that a party for whose benefit a stipulation in a simple contract is made may maintain a suit on such stipulation in his own name": *Fitzgerald v. Barker*, 70 Mo. 685-687. "There is a conflict of the authorities in this country upon the subject, and the right was not recognized in the earlier decisions of this court, but it is now settled in this state that a third person may maintain an action in his own name upon a contract supported by a consideration made in his favor, though not made with him": *Smith v. Lewis*, 3 B. Mon. 229. The above doctrine is subject to some limitations, one of which is that to entitle a third person to sue on a promise between two others for his benefit, a clear intent upon the part of both parties that one shall become the debtor of the third is necessary, and the mere fact that the third might be benefited is not sufficient: *Wright v. Terry*, 23 Fla. 160; *Chung Kee v. Davidson*, 73 Cal. 522. Other limitations are excellently expressed in *Burton v. Larkin*, 36 Kan. 246, 59 Am. Rep. 541, to the effect that the rule that a person for whose benefit a promise to another, upon a sufficient consideration, is made may maintain an action on the contract in his own name against the promisor is not so far extended as to give to a third person, who is only indirectly and incidentally benefited by the contract, a right to sue upon it. It is not every promise made by one to another from the performance of which a benefit may inure to a third which gives a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must be made for his benefit as its object, and he must be the party intended to be benefited in order to be entitled to sue upon it. The name of the party to be benefited need not be given if he is otherwise sufficiently described or designated. He may be one of a class of persons, if the class is sufficiently described or designated. In any case where the person to be benefited is in any manner sufficiently described or designated he may sue upon the contract. A stranger to a contract cannot be benefited thereby unless he is the party intended to receive the benefit; and unless there be at the time of the promise such an obligation on the part of the promisor towards him as gives him, at least, an equitable right to the benefit of the promise: *Parlin v. Hall*, 2 N. Dak. 473. In New York, where the rule has been applied under a greater variety of circumstances than in any other state in the union, the right of the beneficiary to sue is admitted in cases where the contract is made with the intention to benefit such third person, and there is a duty owing him from the promisor: *Lawrence v. Fox*, 20 N. Y. 268. But in *Garnsey v. Rogers*, 47 N. Y. 233, 7 Am. Rep. 440, Rappallo, J., said: "I do not understand that the case of *Lawrence v. Fox* has gone so far as to hold that every promise made by one person to another, from the performance of which a third would derive a benefit, gives a right of action to

such third party, he being neither privy to the contract nor the consideration. To entitle him to an action the contract must have been made for his benefit. He must be the person intended to be benefited." Again, in *Frooman v. Turner*, 69 N. Y. 280, it was said that "to give a third party who may derive a benefit from the performance of the promise an action there must be: 1. An intent by the promisee to secure some benefit to the third party; and 2. Some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally." Again, in *Lake Ontario Shore R. R. Co. v. Curtiss*, 80 N. Y. 219-222, the court said that "when two parties, for a consideration sufficient as between themselves, covenant to do some act which, if done, would incidentally result in the benefit of a mere stranger, that stranger has not the right to enforce the covenant, although one of the contracting parties might enforce it as against the other." "I know of no authority to support the proposition that a person not a party to a promise, but for whose benefit the promise is made, can maintain an action to enforce the promise, where the promise is void as between the promisor and promisee for fraud, or want of consideration or failure of consideration"; *Dunning v. Leavitt*, 85 N. Y. 30-35; 39 Am. Rep. 617. A promise or contract entered into for the benefit of a third person may be rescinded by the parties to it at any time before the beneficiary makes himself a privy thereto, by adopting the promise or contract: *Merrick v. Giddings*, 1 Mackey, 394; *Davis v. Culloway*, 30 Ind. 112; 95 Am. Dec. 671. But it is a good defense to the action of such third party to show a rescission by the parties before his acceptance of it, or that the consideration for it has failed: *Amonett v. Montague*, 75 Mo. 43. After knowledge of, and assent to, such contract by the person for whose benefit it is made, his right of action on it cannot be affected by a rescission of the contract by the immediate parties to it: *Bassett v. Hughes*, 43 Wis. 319.

ROSENTHAL v. CIRCUIT JUDGE.

[98 MICHIGAN, 208.]

ATTACHMENT—ABUSE OF PROCESS.—A party is not permitted to take out a writ of attachment, knowing it to be invalid, and issued upon an affidavit confessedly defective, and attach property under it not subject to levy, and thus gain information or evidence upon which to base a proper writ, and sustain that writ by such means. The evidence thus obtained is not competent for any purpose, and the party having possession thereof is bound to surrender it, and make proof that he has surrendered the whole thereof, so that it may not be used by him or any one else for any purpose.

ATTACHMENT—BOOKS OF ACCOUNT.—Books of account and trial balances are not property of such tangible character that they can be subjected to attachment. They may be evidences of debt, but their seizure is not the attaching of the debt itself. They are not so intimately connected with the demands charged therein that the seizure of the books is equivalent to the seizure of the demands, and there is no means by which such demands can be transferred by a direct levy and sale.

INQUISITORIAL PROCESS.—The process of courts of justice can never be used for inquisitorial purposes, or for oppression, and such use be sustained.

APPLICATION for *mandamus*.*Bunker and Carpenter*, for the relator.*Brown and Lovelace*, for the respondent.

209 LONG, J. Relator is garnishee defendant in a cause pending in the Muskegon circuit court, in which Samuel Rosenwald, Julius Rosenwald, and Julius Weil are plaintiffs, and Sol Rosenthal and Sam Rosenthal are the principal defendants. The principal cause was commenced by writ of attachment issued out of the circuit court, and the garnishee proceedings are based thereon. After the writ of garnishment was served, Bunker and Carpenter, as attorneys for the garnishee defendant, entered a motion in the cause for an order requiring Norris J. Brown and George S. Lovelace, attorneys for the plaintiffs in the original suit, to deliver up to defendants' counsel all copies taken by them, or either of them, of the books of account, trial balances, and private papers of the firm of Rosenthal Brothers, composed of Sol and Sam Rosenthal, the principal defendants, and severally to make oath that, at the time of such delivery, such copies embraced all that said Brown and Lovelace, or either of them, believed to exist, and that said Brown and Lovelace be severally restrained from using in any way the books and papers attached in the principal proceeding, or from disclosing their contents, or the contents of copies taken from them, for the purpose of this case, or for any other purpose whatever, for the reasons:

1. Because the books of account, trial balances, and ²¹⁰ private papers are not attachable, under the laws of this state.

2. Because said Brown and Lovelace, who examined the attached books, trial balances, and papers, and took copies thereof, were, and each of them was, guilty of an abuse of their powers and duties as officers of the court and of the process of the court.

3. Because said Brown and Lovelace used the process of the court for an unlawful purpose.

4. Because the sheriff of the county exceeded his authority, and was guilty of an abuse of his powers and duties, in permitting said Brown and Lovelace to make an examination of the books and papers so attached, and to take copies therefrom.

5. Because said examination was made and said copies were taken while said books, trial balances, and papers were in the possession of the sheriff of said county, who then held

them under an unauthorized seizure by virtue of a writ of attachment then in his hands.

This motion was based upon the testimony of Mr. Lovelace and of the sheriff, given in the case of *George B. Cluett et al. v. Gates L. Rosenthal, Garnishee of Sol and Sam Rosenthal*, an abstract of which was filed in the cause, and upon an exhibit introduced in evidence in said last-named case, the same being a circular letter written by said Brown and Lovelace to the creditors of the firm of Rosenthal Brothers, and upon certain affidavits filed, and the files and records in this cause.

The motion was heard in the court below, and denied. *Mandamus* is asked to compel the court to set aside the order denying the motion, and to grant the order asked.

It appears that, prior to the issuing of any writ of attachment against Rosenthal Brothers, they had executed a chattel mortgage to Gates L. Rosenthal, the garnishee defendant here. Proceedings were taken to foreclose that mortgage, and the stock of goods and other property which it covered, amounting to about thirty thousand dollars, were bid in by Gates L. Rosenthal, who claimed, at the time attachment proceedings were commenced, to be in possession. Brown and Lovelace ²¹¹ having a claim in their hands not yet due, sued out a writ of attachment on said claim, placing it in the hands of the sheriff of the county, who entered the store where the properties were situate, and of which Gates L. Rosenthal claimed to be in possession, and seized and took into his possession certain moneys, books of account, paid and canceled checks, trial balances, and other books and papers. He took these books to the county jail, and there permitted Brown and Lovelace, who were plaintiff's attorneys in the writ, to examine them, and to take copies from them. After this was done the property so attached was returned to the store, and the attachment proceedings discontinued. It is admitted by Brown and Lovelace that they knew that this writ of attachment could not be sustained if a motion was made for its dissolution, as the action was brought upon a debt not yet due, and no sufficient showing had been made in the affidavit to sustain such a writ. Brown and Lovelace, having obtained certain facts from the examination of the books and papers of Rosenthal Brothers, sued out a second writ of attachment in the circuit court for Muskegon county, in favor of George B. Cluett and others against Rosenthal Brothers, and caused a writ of garnishment to issue against Gates L. Rosenthal.

That cause was heard in the circuit court, and is now pending in this court upon appeal. In that case, in order to establish the plaintiff's claim that Rosenthal Brothers had made a fraudulent mortgage, and to show that Gates L. Rosenthal had properties and effects in his hands belonging to the principal defendants, Mr. Lovelace was called as a witness, and was permitted to testify to certain facts which he found by an examination of these books and papers. Upon his cross-examination in that case it appears that he took copies of such books and papers, including trial balances. It is for the surrender of such papers and copies so taken that this application was made to the court below.

²¹² In the Cluett case Mr. Lovelace testified fully as to what examination he made, and that after such examination he was in a position to make an affidavit under the law for the issuing of a writ of attachment. From Mr. Lovelace's testimony it is quite apparent that Brown and Lovelace knew the first writ of attachment could not be sustained under the affidavit upon which it was based, and that the first writ was used for the purpose of getting evidence upon which to ground subsequent writs. No return was ever made to this first writ, but, on the contrary, the suit was discontinued, and the writ withheld, as soon as the evidence was obtained. It is true that Brown and Lovelace deny that the writ was issued for the purpose of getting this information, but whether it was issued for that purpose or not, it was so used.

To the order to show cause, the circuit judge makes a return, in which he says that upon the trial of the Cluett case an objection was made to the introduction in evidence of the contents of the books of Rosenthal Brothers, but that such evidence was allowed and that the jury in that cause found adversely to the relator; that in the present case the writ of attachment was sued out by Thomas C. Clark, as attorney for plaintiffs, and that Brown and Lovelace were thereafter substituted in his stead. It is further returned, that it appeared, upon the hearing of the motion, that the books and papers claimed to have been inspected were mortgaged by Sol and Sam Rosenthal to relator, as trustee for himself and other creditors, before said attachment, and which mortgage, if valid, was in force at the time said property was attached, and that relator had no rights or interests in the books and papers, except such as he obtained by said mortgage, and that such books and papers were the property

of Sol and Sam Rosenthal, and constituted a part of a large amount of property attached. The return further sets forth that upon the hearing of ²¹³ the motion relator made no showing that plaintiffs would use, or attempt to use, the evidence as to the contents of these books and papers upon the trial of said cause wherein relator was interested, and that it did not appear that relator was entitled to the copies of the books and papers taken by Brown and Lovelace. From all the evidence the court determined that the writ of attachment was issued in good faith, and executed in good faith, and that there was no abuse of the process of the court, and that Brown and Lovelace ought not to be compelled to surrender such copies, or to make the oath asked. The return nowhere denies that the mortgage had been foreclosed, and the property bid in by Gates L. Rosenthal. This fact appears from the testimony of Mr. Lovelace, and is nowhere contradicted. But it is assumed not only that the mortgage was void, but that the sale was also void, and therefore the relator had no right to possession, such assumption being based upon the facts obtained by the use of the first writ of attachment.

We think there is conclusive evidence that the facts obtained by Brown and Lovelace are a part of the case, and the foundation of the case in hand. The only question involved is, has there been an abuse of the process of the court? Can parties be permitted to take a writ of attachment, knowing it to be invalid, and issued upon an affidavit confessedly defective, and attach property under it which is not subject to levy, and gain information or evidence upon which to base a proper writ, and sustain that writ by such means? It is said by counsel for plaintiffs in the writ, who appear here to defend the action, that it is an effort to have this evidence adjudged incompetent; and for this reason restrain its use, and thus anticipate a ruling of the court below thereon in advance of a trial, and without any showing that it will be offered. This is not the point in issue here, and does not reach the question involved. ²¹⁴ The claim is, that the process of the court has been abused, in that a writ of attachment utterly void, and known to be void by the attorneys causing its issue, and who are officers of the court, has been used to obtain evidence upon which to found subsequent proceedings, and for inquisitorial purposes; that this being so, the evidence thus obtained is not competent for any purpose, and the parties having possession of any copies contain-

ing such evidence are bound to surrender them, and make proof that they have surrendered the whole thereof, so that they may not be used by them, or any one else; and that they have no right to the possession of such evidence.

In this we think counsel for relator are correct. These books of account and trial balances are not property of such tangible character that they can be made subject to such levies. They may be evidences of debt, but their seizure is not the attaching or seizure of the debt itself. They are not so intimately connected with the demands charged therein that the seizure of the books is equivalent to the seizure of the demands, and there is no means by which these demands can be transferred by a direct levy and sale: Freeman on Executions, sec. 112; *Commonwealth v. Abell*, 6 J. J. Marsh. 476; *Thomas v. Thomas*, 2 A. K. Marsh. 430; *Wier v. Davis*, 4 Ala. 442; *Carlos v. Ansley*, 8 Ala. 900; *Horton v. Smith*, 8 Ala. 73; 42 Am. Dec. 628. In *Dart v. Woodhouse*, 40 Mich. 399, 29 Am. Rep. 544, it was held that a set of manuscript abstract books is not subject to levy and sale on execution. In *Perry v. City of Big Rapids*, 67 Mich. 146, 11 Am. St. Rep. 570, it was held that such abstract books have no intrinsic value, and are not taxable. In Drake on Attachments, sixth edition, section 249, it is said: "Where property is of such nature that an attachment of it would produce a sacrifice and great injury to the defendant, without benefiting the plaintiff, it is not attachable. Such is the rule in relation to the defendant's private papers, or his books in which his accounts are kept. Much less would an attachment be considered to create a ²¹⁵ lien on the accounts contained in the books"; citing *Bradford v. Gillespie*, 8 Dana, 67.

In *Dart v. Woodhouse*, 40 Mich. 399, 29 Am. Rep. 544, Mr. Justice Campbell said: "It would be very absurd to hold that books could be seized and sold on execution which after sale the purchaser could not use."

It is conceded that these books and papers seized were not of any value in themselves. Mr. Lovelace says they were not of much value, except as evidence. In *People v. Board of Auditors*, 5 Mich. 223, it was held that a warrant drawn by the board of auditors is not subject to levy on execution. In *Bradford v. Gillespie*, 8 Dana, 67, it was held that a return on an attachment of "Levied upon an account book, the property of the defendant," will not authorize a judgment.

As before stated, the real gist of the complaint here is not

that property was levied upon which was not subject to levy, but the use which was made of the process of the court. It is seen that the attachment was void, and was levied upon property not subject to levy, yet the parties responsible for it—officers of the court—are permitted to use the evidence thus obtained. If the writ had been valid, and the property taken under it had been subject to levy, it was the duty of the sheriff to “safely keep the same to satisfy any judgment that may be recovered by the plaintiff in such attachment”: Howell’s Statutes, sec. 7990. Instead of doing this, the writ was used as a search warrant for evidence, and, having obtained the evidence sought, the books were returned. Had the defendants been charged with a crime it would have been necessary, in order to obtain a writ which would accomplish what was accomplished here, to show to the satisfaction of the court that probable cause existed, which showing must have been supported by oath or affirmation, the place particularly described, and a description ²¹⁶ of the property to be searched for or seized have been set forth with exact particularity.

“Search warrants were never recognized by the common law as processes which might be availed of by individuals in the course of civil proceedings, or for the maintenance of any mere private right; but their use was confined to cases of public prosecutions instituted and pursued for the suppression of crime, or the detection and punishment of criminals”: *Robinson v. Richardson*, 13 Gray, 456.

Article 6, section 26, of our own state constitution provides: “The person, houses, papers, and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place, or to seize any person or things, shall issue without describing them, nor without probable cause supported by oath or affirmation.”

Here the parties were charged with no crime, yet upon a void process—one which the parties causing its issue confessedly knew to be void—a levy was made upon property not subject to seizure, and copies made thereof; and these copies are now held by these officers, and have actually been permitted to be used in one case as evidence, and in the present case are the foundation upon which the writ was issued.

But one case has been called to our attention where such a proceeding has before been attempted. In *Hergman v. Dettlebach*, 11 How. Pr. 46, it appears that a deputy sheriff, under

an attachment, levied upon certain books, papers, letters, and correspondence of a partnership. It was held that under the New York statute certain books and papers of a partnership were subject to levy, but letters and correspondence were not among those authorized to be taken. It was said: "As the whole proceeding on the part of the deputy in examining the books and papers is grossly irregular an order must be made that the regular books of account of ²¹⁷ the firm and its notes, policies of insurance, and all other securities and vouchers be safely kept by the deputy sheriff under lock and key, without power on the part of such deputy, or any other person, except the defendants, to look into or examine the same, except under the special order of the court, to be made on notice to the defendants."

It was further said: "All other papers, of every name and description, taken by such deputy, and all translations or copies of such translations, if any, of the books, letters, vouchers, or papers, must be delivered up forthwith to the defendants' attorneys; and, to insure the same, such delivery must be made under an affidavit to be made by such deputy, by the plaintiffs, and their attorneys and counsel; that, at the time of such delivery such copies embrace every translation or copy of such translation, or copy of such original, which the deponent knows of, or believes, or has any reason to believe, exists; and the plaintiffs and their attorneys, agents, and counselors are hereby restrained from in any way using such original books and papers, or using or disclosing the contents of such copies, in any manner whatsoever, except by special order of the court. This order must be complied with forthwith."

The process of courts of justice can never be used for inquisitorial purposes or for oppression, and such use be sustained. If such a practice should be countenanced no man's private papers would be free from search or seizure.

The writ must be granted as prayed.

The other justices concurred.

ATTACHMENT.—WRONGFUL: See *Seattle Crockery Co. v. Haley*, 6 Wash. 302; 36 Am. St. Rep. 156, and note.

ATTACHMENT—WHAT SUBJECT TO.—Attachment can be levied only on such property as is subject to levy and sale under execution: *Roby v. Labugan*, 21 Ala. 60; 56 Am. Dec. 237.

PROCESS—ABUSE OF.—Where process is willfully made use of for a purpose not justified by law this is an abuse for which an action will lie: *Ant-cliff v. June*, 81 Mich. 477; 21 Am. St. Rep. 533.

MEE v. BENEDICT.

[98 MICHIGAN, 260.]

COTENANCY—CONVEYANCE OF TIMBER—PARTITION.—When part of the owners of an undivided tract of timbered land convey their interest in the timber to a stranger, and subsequently join with the remaining owner in a deed in fee of the whole tract to a third person, without reservation, of the timber, and with notice to such grantee of its sale and conveyance, the vendee of such timber is substituted to the rights of his grantors, and may compel partition of the timber and land as a whole, notwithstanding the merger of the title, and may enforce his right to cut and remove the timber pursuant to the terms and conditions of his deed.

DEEDS—CONVEYANCE OF TIMBER.—Standing timber is an interest in lands that may be acquired by deed, and the fact that the deed contains a provision that such timber must be removed within a definite period does not prevent the title thereto from vesting in the grantee.

DEEDS—CONVEYANCE OF TIMBER—IDENTITY OF LANDS.—A deed of standing timber, executed in another state, describing the lands by section, township, and range, so certified as to entitle it to record, and recorded in the county in which the grantor holds title to lands corresponding in description to those described in the deed, sufficiently identifies the lands.

DEEDS—SIGNATURE—CONVEYANCE OF STANDING TIMBER.—The failure of a grantor in a deed of standing timber to affix a seal to the instrument does not render it invalid.

DEEDS—RECORD COPY AS EVIDENCE.—The record of a deed of standing timber is *prima facie* evidence of the sale of the timber and of the execution of the instrument.

P. W. Niskern and C. W. Sessions, for the appellants.

E. E. Benedict, for the respondents.

261 MONTGOMERY, J. The bill in this case is filed to determine the rights of the complainants in and to the timber growing upon certain lands described in the bill. It appears that the lands were held by several tenants in common. The owners of twenty-three twenty-fourths of the land conveyed all their right, title, and interest in the timber to complainants. One Hart was the owner of the remaining one twenty-fourth which was not conveyed to complainants. Subsequently, those from whom complainants purchased, and Hart also, conveyed to the defendant Benedict, Benedict being the owner of the entire fee, subject to any rights that complainants have in the timber.

In the case of *Benedict v. Torrent*, 83 Mich. 181, 21 Am. St. Rep. 589, this court considered the rights acquired by the respective parties. It was there held that the conveyance

²⁶² by the owners of the twenty-three twenty-fourths of their rights in the timber did not confer a right upon Torrent and his codefendants to ask and have a partition of the timber; that a partition of the timber distinct from the lands could not be had. It was said:

"The only interest which such a purchaser takes is the interest in the timber upon such lands as in partition proceedings shall be set off to his grantor. Such partition must be made of the entirety of the estate, according to the shares held by each. When this is done, the purchaser of the timber would be entitled to all the rights secured by his conveyance. The cross-bill in this case is filed for the sole purpose of effecting a partition of the timber. It is not framed to obtain a partition of the entire estate."

The present bill is framed to meet the objection, and alleges, in substance, that the purchase of the interest by Benedict from the several owners, so as to invest Benedict with the title to the whole, was with a view to defeating a partition of the lands, by means of which the complainants' equity is to be worked out, and amounted to a fraud upon the rights of complainants. The transaction need not necessarily be so characterized. When the title rested in complainants' grantors, they having conveyed their interest in the timber upon the lands, the only means of making that conveyance effectual, to carry out the intent of the parties, was for said owners of the fee to ask and obtain partition of the lands. This they had the right, and it was their duty, to do, and equity would require and compel action on their part to that end. To deny this would be to permit the grantors of the timber to perpetrate a legal fraud upon their vendees. They have received a consideration for the timber, and have granted all the timber upon the lands to the complainants. This clearly includes all interest which they acquire on partition: See *Cunningham v. Pattee*, 99 Mass. 250; *White v. Sayre*, 2 Ohio, 112; *Stark v. Barrett*, 15 Cal. 370; *Harlan v. Langham*, 69 ²⁶³ Pa. St. 238; *Boggess v. Meredith*, 16 W. Va. 1; *Whitton v. Whitton*, 38 N. H. 133; 75 Am. Dec. 163; *Barnhart v. Campbell*, 50 Mo. 599; *Freeman on Cotenancy and Partition*, secs. 199, 206, 207; and *Campau v. Godfrey*, 18 Mich. 27; 100 Am. Dec. 133. In this last-mentioned case the question was raised, but not decided, as to whether the purchaser of a distinct parcel, less than the whole, from one cotenant, could sustain a bill for partition against the cotenant. The query

was also suggested as to whether, if any of the cotenants should bring a bill for a partition, there would be any difficulty in making the purchaser a defendant. It was said: "The necessity of making the purchaser a party, or even of having two suits or two partitions in the same suit, instead of one, if the shares can still be fairly set off to the cotenants, might seem to be a consideration going only to the costs of the proceeding, rather than an objection upon which alone the deed could be held void."

The question in this case is, shall the grantor be permitted to retain the consideration, and say to the purchaser that, as he (the purchaser) cannot ask for partition of the timber distinct from a partition of the entire estate in common, therefore the title which thus he assumed to convey shall prove ineffectual? Are the rules of equity so unyielding as to sanction this monstrous injustice? We think not. We do not depart from the doctrine that such conveyance is void as against the cotenant, but it is void only in so far as it affects the cotenant's rights. He may give assent to the conveyance, and thereby make it effectual. It is void so far as that the cotenant's interests shall not be injuriously affected by the conveyance; but it is not void as against the grantor, and we think it is competent, under the general equity powers of the court, to compel the grantor of a special interest to take such steps as to make his conveyance effectual. It is within his power to do so. He has received the consideration of the specific thing, ²⁶⁴ to wit, the timber, to which his conveyance shall attach upon partition. He is, in law and morals, bound to take such steps as shall give effect to his conveyance. It would be a premium on fraud for a court of equity to admit its inability to compel the performance of this plain duty. The complainants having the right, it follows that it cannot be defeated by the fact that the entire title is now merged in Benedict.

It is true that some of the cases speak of a transfer purporting to convey, by metes and bounds, an estate less than the entire of that of the cotenant, as being void as against the cotenant, and this supposition of absolute invalidity has led to results in some cases not altogether just. But it seems to me the more correct way to state the result of the authorities is that such a conveyance is good as between the parties to it, but that it is not to be permitted to affect injuriously the rights of the cotenants. This results in nothing more

than that, on partition, the cotenant should be entitled to partition precisely as though no conveyance had been made. But it seems to me a manifest perversion of justice to say that, because the law declares that the cotenant may not have his rights injuriously affected by such a conveyance, he may profit by the fact that he is a cotenant, and that circumstance shall enable him to defeat the right vested in the grantees of his cotenant. Mr. Freeman, in his excellent work on Cotenancy and Partition, says:

"Although the deed does not impair the rights of the other cotenants, it by no means follows that they may treat it as void, or entirely disregard it. While falling short of what it professes to be, it nevertheless operates on the interest of the grantor by transferring it to the grantee. The latter acquires rights which the cotenants ought to be bound to respect. They ought not to be permitted to ignore his conveyance, and treat him as one having no interest in the property": Freeman on Cotenancy and Partition, sec. 199.

²⁶⁵ And so the courts in Ohio, West Virginia, California, Missouri, Pennsylvania, and New Hampshire have held that a grantee of a cotenant is a necessary party to proceedings in partition: See cases above cited. Mr. Freeman further sums up the result of these cases upon the effect of a conveyance, as follows:

"We are not sure that the difference in the decisions of many of the courts upon this subject has not been more in form of expression than in matters of substance. If, however, there remain any states wherein the courts really intend to assert that a conveyance by one cotenant of part of the common property is void in any other sense than that such conveyance will not operate to diminish or impair the rights of the nonassenting cotenants, such courts are falling into the minority, as the more recent decisions tend strongly and surely towards the recognition of such conveyance as a valid transfer of all the grantor's interest in the property therein described, entitling the grantee to certain rights that the cotenants of the grantor cannot wantonly disregard": Freeman on Cotenancy and Partition, sec. 204.

This conclusion is not only sustained by the cases hereinbefore referred to, but by the further cases of *Crook v. Vandervoort*, 13 Neb. 505; *Camoron v. Thurmond*, 56 Tex. 22; *Markoe v. Wakeman*, 107 Ill. 263; *Crocker v. Tiffany*, 9 R. I. 505; and *Worthington v. Staunton*, 16 W. Va. 208.

The precise question involved in this proceeding has perhaps never been directly passed upon in the same form of proceeding, but the principle which we apply has been fully asserted in at least two cases. In the case of *McKee v. Barley*, 11 Gratt. 340, John T. McKee and Mary Bratton owned a tract of land, including a small triangular piece which John T. McKee conveyed by metes and bounds to the defendant, Barley. Subsequently John T. McKee and Mary Bratton conveyed to Samuel W. McKee the entire tract, including that previously conveyed to Barley by John T. McKee. The court say:

"If, upon a partition, that part of the land described **266** in this deed, or affected by the water privileges, had been assigned to John T. McKee he would have been in a condition to have executed his contract, if he would not, in that event, have been estopped by his deed from disturbing his vendee; and his son, claiming under his subsequent conveyance with full notice, can occupy no higher ground. A court of equity, in making partition, would have respected the rights acquired by a fair purchaser, provided no injury was done thereby to the coparcener. . . . As the conveyance of both the joint owners to the appellant, Samuel, has invested him with the legal title to the entire tract, he is now in a condition to perfect the title of the appellee according to the terms of the contract, as evidenced by the deed from John T. McKee. This is all the decree requires him to do, and I think it should be affirmed."

The same doctrine is affirmed in *Crocker v. Tiffany*, 9 R. I. 512, where it is said:

"If one of two tenants in common should convey his interest in a distinct part of the estate to a third person, and should afterwards convey his interest in the remainder to his cotenant, both conveyances would be valid, for the cotenant could not affirm his own title under the second conveyance without impliedly recognizing the right of the grantor thus to convey the estate by distinct parcels": See, also, *Great Falls Co. v. Worster*, 15 N. H. 415.

We think that the conclusions which we have heretofore stated are clearly within the principles to be deduced from the prevailing authorities.

I concur with the chief justice upon the other points discussed by him.

A decree will be entered directing that the lands be partitioned. The partition will not be of the timber as distinct from the lands, but of the lands and timber as a whole. Twenty-three twenty-fourths should be assigned to one parcel, and one twenty-fourth to another, and upon such partition being made, the complainants will be declared to be the owners of the timber upon the larger parcel, and entitled to cut and remove it from the lands ²⁶⁷ within the time provided in their deeds of purchase. The complainants will recover costs of both courts.

MCGRATH and LONG, JJ., concurred with MONTGOMERY, J.

HOOKER, C. J. The complainants, with the exception of Harry Mee, claim the ownership of the undivided twenty-three twenty-fourths of the timber upon the land in controversy. The testimony shows that complainant Mee was made a party without his consent. Defendant Edwin E. Benedict claims the premises in fee simple. Defendant Sarah B. Williams is Benedict's sister, and holds a mortgage upon the land given by him. Defendants Hart, Sparrow, and Seymour have no present interest in the property. On April 29, 1887, the title to said land stood as follows: Hart, one twenty-fourth; Pease, twelve twenty-fourths; Mee and Seymour, eleven twenty-fourths. Upon that day, Pease conveyed to Mee, by instrument in writing, all of his interest in the timber upon the land. On May 4, 1887, Mee and Seymour conveyed all of their interest in said timber to complainants Torrent, McKillip, Haines, and Hopper, copartners, doing business under the name of Torrent, Haines & Co. They claim that this conveyance vested the title to twenty-three twenty-fourths of the timber in them. The defendants claim that, at most, it conveyed eleven twenty-fourths. On March 1, 1888, Pease deeded his remaining interest in the premises to complainant Mee in trust for Hart, and on March 22d Mee deeded all of his interest to Hart. On the same day Seymour deeded her interest to Hart. No reservation of timber was made in any of these deeds. April 17, 1888, Hart deeded the land to Sparrow, and June 11, 1888, Sparrow deeded the same to Benedict, who held some tax titles upon the premises, which are admitted to have been invalid. By the first conveyance from Pease to Mee, the ²⁶⁸ latter acquired title to twelve twenty-fourths of the timber if the conveyance was valid, which, together with the interest he and

Seymour had as owners of eleven twenty-fourths of the fee, gave them together the title to twenty-three twenty-fourths of the timber. The following is a copy of the record of that instrument:

"Copy from Miscellaneous Records of Manistee County, Liber 3, page 178, made May 4, 1887, at 11½ o'clock, A. M.:

"*Know all men by these presents*, that I, Frank B. Pease, of the city of Chicago, in the county of Cook, and state of Illinois, of the first part, for and in consideration of the sum of five hundred (\$500) dollars, lawful money of the United States, to me in hand paid at or before the ensealing and delivery of these presents by Harry Mee, of Manistee, Michigan, party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and delivered unto the said party of the second part all the goods, chattels, and property, to wit, all my interest in and to the timber on the premises described as follows, to wit: The S. W. qr. of the S. E. qr. of sec. 30, township 21 N., R. 14 west; also, the W. fractional half of the S. W. qr. and the S. W. qr. of the N. W. qr., sec. 31, township 21 N., R. 14 west; and the S. W. qr., sec. 30, and the N. W. fr. qr. of the N. W. qr., and the east half of N. W. qr., and the east half of S. W. qr., and the N. E. qr. of sec. 31, and the west half of the N. W. qr. of sec. 32, township 21 N., R. 14 W.; and the south half of the N. E. qr., and the N. E. qr. of the N. E. qr., and the N. E. qr. of the S. W. qr. of sec. 36, township 21 N., R. 15 W.; and lot 4, sec. one (1), and lot one (1), sec. 2, township 20 north, range 15 west—and all the above-described land west of the principal meridian, and contains, in all, 1,034 38-100 acres, more or less; with license for the term of ten years to the said party of the second part, his heirs and assigns, to enter upon the said lands to cut and remove the said timber, and all such timber not so cut and removed during the said term shall belong to said party of the first part.

"It is also agreed that the said party of the second part shall pay all taxes on the land above described during the term above mentioned, or so much thereof as may be used in cutting and removing said timber.

"To have and to hold the said goods, chattels, and ³⁶⁹ property unto the said party of the second part, his heirs, executors, administrators, and assigns, and for his own proper use and behoof, forever.

"And the said party of the first part does vouch himself to be true and lawful owner of the said goods, chattels, and property, and have in himself full power, good right, and lawful authority to dispose of the said goods, chattels, and property in the manner as aforesaid; and I do, for myself, my heirs, executors, and administrators, covenant and agree, to and with the said party of the second part, to warrant and defend the said goods, chattels, and property to the said party of the second part, his executors, administrators, and assigns, against the lawful claims and demands of all and every person or persons whomsoever.

"In witness whereof I have hereunto set my hand and seal the 29th of April, 1887. FRANK B. PEASE.

"Here follow, in usual form, the acknowledgment, Chicago, Ill., April 29, 1887; certificate of office of notary, Chicago, Ill., April 30, 1887."

This instrument is assailed upon several grounds, viz:

1. The book called "Miscellaneous Records" is not a book of deeds or mortgages, and the record in that book was notice to no one.

2. The instrument does not show in what state the lands described are situated.

3. The instrument was a mere license to take off goods and chattels within ten years from its date.

Standing timber is an interest in lands that may be acquired by deed: See *Johnson v. Moore*, 28 Mich. 3; *Wait v. Baldwin*, 60 Mich. 622; 1 Am. St. Rep. 551; *Williams v. Flood*, 63 Mich. 487; *Monroe v. Bowen*, 26 Mich. 523; and the fact that it must be removed within a definite period does not prevent the title to the timber vesting in the grantee: See cases above cited.

The land was described by the section, township, and range. Pease, the maker of the instrument, had title of record to these lands. Although the acknowledgment was taken in Chicago, the certificate of the official character of the notary was appended, and the paper placed on record in Manistee county, where the lands are situated. ²⁷⁰ This, we think, sufficient evidence to identify the lands sought to be described: *Russell v. Sweezey*, 22 Mich. 235; *Smith v. Brown*, 34 Mich. 455; *Slater v. Breese*, 36 Mich. 77.

The failure of Pease to affix a seal to the writing did not render it invalid; for, if the seal should have been affixed, the statute (Howell's Statutes, sec. 7778) provides that its ab-

sence shall not invalidate the instrument: *Fowler v. Hyland*, 48 Mich. 181; *Lockwood v. Bassett*, 49 Mich. 549; *McKinney v. Miller*, 19 Mich. 151.

The instrument was duly acknowledged, thereby becoming entitled to record: Howell's Statutes, secs. 5673, 5709, 5712. The record shows that this instrument was recorded in a book devoted to the exceptional instruments offered for record, such as bills of sale of timber, land contracts, deeds of cemetery lots, leases of buildings, and various other kinds of papers. There is nothing to show that this record was not properly indexed, and the register might properly provide a book for miscellaneous documents. Such is believed to be the uniform practice throughout the state, and we think it a lawful and commendable one. The record of this writing was constructive notice to the world of the rights of Mee under it: Howell's Statutes, sec. 5712.

There is no merit in the point that the original writing was necessary to prove the sale of this timber. The record could be used for the purpose, and was *prima facie* evidence of the execution of the instrument: Howell's Statutes, sec. 5685; *Bassett v. Hathaway*, 9 Mich. 31.

This covers all of the questions that arise upon the introduction of the instrument (similar in character) by which Mee and Seymour attempted to convey their interest in the timber to Torrent, Haines & Co.

It remains to discuss the effect of these writings and the rights of the several parties under them. At the time that they were made Hart was a tenant in common of the lands, and it is asserted that they were void as to him. ²⁷¹ It is a doctrine of long standing that one tenant in common cannot convey a distinct parcel of the common tract so as to bind his cotenant: *Smith v. Benson*, 9 Vt. 141; 31 Am. Dec. 614; *Duncan v. Sylvester*, 24 Me. 482; 41 Am. Dec. 400; *Great Falls Co. v. Worster*, 15 N. H. 412, 449; *Bartlet v. Harlow*, 12 Mass. 348; 7 Am. Dec. 76; *Peabody v. Minot*, 24 Pick. 329; *Johnson v. Stevens*, 7 Cush. 431; *Mitchell v. Hazen*, 4 Conn. 495; 10 Am. Dec. 169; *Griswold v. Johnson*, 5 Conn. 363; *Hartford etc. Ore Co. v. Miller*, 41 Conn. 112; *Cogswell v. Reed*, 12 Me. 198; *Scott v. State*, 1 Sneed, 629; *Markoe v. Wakeman*, 107 Ill. 263; *Worthington v. Staunton*, 16 W. Va. 208; *Shepardson v. Rowland*, 28 Wis. 108; *Jewett v. Stockton*, 3 Yerg. 492; 24 Am. Dec. 594. Cases might be multiplied upon this point, but these will suffice. Some hold the deed absolutely void, but

the greater number treat it as valid between the parties, and hold that, if a partition should be made by which the parcel conveyed should be allotted to the grantor, it would inure to the benefit of the grantee by estoppel. Some courts have evolved the doctrine that the conveyance is binding to some extent upon the cotenant; holding that it is binding so far as it does not injure, and that the courts may give relief to the grantee, taking care not to deprive the cotenant of any rights. Others have gone to the extent of holding that such conveyance is valid as against the cotenant, and, as in *Prentiss' case*, 7 Ohio, pt. 2, 129, 30 Am. Dec. 203, that he can be compelled to partition with each of several grantees of different parcels of the tract. It may be mentioned that the case of *White v. Sayre*, 2 Ohio, 112, upon which this decision is based, was by a divided court. In Missouri the court has gone so far as to hold that the deed is valid against the cotenant, and that the grantee may have relief, because the statute authorizing a sale furnishes a means of giving adequate relief to the cotenant in all cases. The various phases of this question may be seen by consulting the following cases: ²⁷² *Stark v. Barrett*, 15 Cal. 370; *Gates v. Salmon*, 35 Cal. 588; 95 Am. Dec. 139; *Sutter v. San Francisco*, 36 Cal. 115; *Crook v. Vandervoort*, 13 Neb. 505; *Camoron v. Thurmond*, 56 Tex. 22; *Arnold v. Cawble*, 49 Tex. 533; *Bogges v. Meredith*, 16 W. Va. 27.

Some of my brethren think that a court of equity may properly grant relief to the grantee in all such cases by requiring the tenants in common to partition the land, but I cannot assent to that doctrine. In the case of the conveyance of a single parcel, no hardship might result from such a course; but if several parcels should be carved out and sold to different purchasers, as, in one case, where one tenant in common platted and sold village lots from a part of the tract, or where different interests, such as minerals, stone, sand, clay, and the like, are granted, it would be more difficult to preserve the rights of the cotenant. I think the great weight of authority is against it.

But while the conveyance of a portion by one tenant in common may be disregarded by his cotenant, if such cotenant, or any other person, shall, with notice of the grantee's interest, choose to unite the different titles by purchasing the remaining interest of the grantor, he may be held to assent thereby to such conveyance by recognizing the right of the

grantor to deed in parcels, and he will take the title of the grantor subject to the rights of the prior grantee, which equity may compel him to recognize and satisfy. While a tenant in common may insist upon his own, he will not be permitted, in such a case, to collude with his cotenant, or profit by his fraud: *Hartford etc. Ore Co. v. Miller*, 41 Conn. 112; *Goodwin v. Keney*, 49 Conn. 563; *Adams v. Manning*, 51 Conn. 5; *Crocker v. Tiffany*, 9 R. I. 512; *Great Falls Co. v. Worster*, 15 N. H. 413. Hart saw fit to unite in himself the titles of all his cotenants. He could only buy what they had left to sell, and, as he took these interests with notice of the sale of the timber, he ²⁷³ cannot justly claim such timber. By his act he has put it out of the power of the complainants' grantors to deliver this timber, but he cannot be said to have acquired the title to it. He has chosen to recognize the sale to the complainants by purchasing the remaining interest. His grantees are in no better position.

There are many allegations in the bill which are unnecessary in the view that I take of the case, but sufficient appears to justify a decree that complainants recover the timber upon twenty-three twenty-fourths of the land, and that partition of the premises be made to determine the same. Complainants Torrent, Haines & Co. should recover their costs against defendants Benedict and Williams. As to the other defendants, the decree of the circuit court dismissing the bill should be affirmed. —

MR. JUSTICE GRANT dissented on the ground that a conveyance by one cotenant of his interest in timber, minerals, or other valuable interests in the common estate which in its nature is indivisible is void and does not give to his grantee any right to call for a partition of the premises: Citing *Adams v. Briggs Iron Co.*, 7 Cush. 361; *Boston Franklinite Co. v. Condit*, 19 N. J. Eq. 394. Judge Grant was also unable to "concur in the view that a cotenant taking a deed without any reservation thereby assents to the transfer of such an interest" as was conveyed under the facts of the present case. "Complainants' vendors had the right to sell the land, and any person, including their cotenants, had the right to buy. The deeds contained no reservation, but purported to convey the entire fee of the land. Their grantors did not agree that they would not sell or that they would obtain partition for the benefit of their grantees. There are now no cotenants entitled to partition unless complainants, by their purchase of the timber, are such cotenants. Under the clear weight of authority complainants did not, by their purchase, become tenants in common with the other cotenants, and cannot, therefore, invoke the benefit of the partition statute, which is applicable only to joint tenants and tenants in common: *Howell's Michigan Statutes*, sec. 7850. But aside from this, the rights of the cotenants and

subsequent purchasers from them may be seriously affected if one cotenant may lawfully sell an undivided interest in any valuable thing that may exist on the land. It is true, in the present case, that their possession would be only temporarily interfered with, for the timber can be speedily removed, but the purchase of a similar interest in a mine or other like property would entitle the purchaser to like possession to explore, to erect plants, to remove his ore, and he would thus become entitled to the permanent possession of the land, or so much thereof as was necessary for his purpose. Would not this affect adversely the rights of the cotenants? May a cotenant convey his interest in the coal to one, in the iron to another, in the clay to another, in the stone to another, and so on, and, because their grantor refuses to take steps to secure a partition, or has sold his remaining interest in the land to his cotenants, may they institute partition suits in the name of their grantor, and have the land partitioned, so that each may have possession to work his mines, quarries, or clay-beds?

"Another difficulty presents itself. If partition of land cannot be made without great prejudice to the owners it must be sold, and the proceeds divided among the cotenants. Very often, if not generally, mining lands cannot be partitioned without great prejudice, and must therefore be sold. Upon such sale, how could the value of an undeveloped mine, or other deposit, be separated from the value of the land in other respects so as to give to the purchaser of an undivided part thereof his proportionate share? Yet by this rule such purchaser would have the right to have the land sold, in order that he might receive the supposed value of what he purchased.

"I do not think that such a rule is founded upon reason or authority. Principles must not be determined by the hardships of an individual case. A principle established to relieve from hardship in one case may lead to greater hardships in another. An important principle is here involved, which must be considered and determined regardless of what the complainants may suffer. It is no answer to the principle to say that the action of complainants' grantors in conveying an interest to them, and the rest of the estate to other parties, is a fraud, intentional or constructive. If it was a fraud in fact, complainants have a remedy at law. But there is no question of fraud involved. Complainants purchased with full knowledge of the facts; so did the defendants and their grantors. The title was of record when complainants purchased the timber, and they are chargeable with knowledge that their grantors held only undivided interests in the land as tenants in common. Defendants also purchased with full knowledge of the facts. The sole question is, therefore, one of law."

COTENANCY—CONVEYANCE BY ONE COTENANT—PARTITION.—A grantee from one of several cotenants of an interest in severalty in a portion of the lands of the cotenancy may compel his grantor and the other cotenants to partition their lands, in order that it may be ascertained whether or not the portion thus granted will be awarded to the grantor, and his grant made effective: *Charleston etc. R. R. Co. v. Leech*, 33 S. C. 175; 26 Am. St. Rep. 667. See *Benedict v. Torrent*, 83 Mich. 181, 21 Am. St. Rep. 589, and extended note, discussing the right of one tenant in common to convey the common property.

DEEDS—EVIDENCE.—An examined copy of a deed to land in Texas, made before a notary in Louisiana, with proof of the execution of the original, and of the names of the parties and the purchase money, is admissible to prove a conveyance of the land: *Frost v. Wolf*, 77 Tex. 455; 19 Am. St. Rep. 761,

and note. A registry copy of a deed is good *prima facie* evidence, and dispenses with a production of the original, except where a grantee relies on the immediate deed to himself, or where, from the nature of the conveyance, the deed is presumed to be in his custody or power: *Scanlan v. Wright*, 13 Pick. 523; 25 Am. Dec. 344, and note.

SPEED v. COMMON COUNCIL OF DETROIT.

[98 MICHIGAN, 360.]

THE WRIT OF PROHIBITION LIES to prohibit the exercise by an inferior tribunal or officer of judicial powers with which he is not legally vested, and to prevent actions in excess of the jurisdiction conferred by law, and not to regulate or control the manner in which a lawful jurisdiction shall be exercised.

OFFICERS—REMOVAL OF—WRIT OF PROHIBITION.—The officer or body upon whom the state has conferred power to remove municipal officers does not act in a purely political, administrative, or legislative capacity. Such officer or body acts in a *quasi* judicial capacity, and its method of procedure must be *quasi* judicial in its character. Hence, such officer or body becomes an inferior judicial tribunal, amenable to the writ of prohibition, when acting in excess of the jurisdiction conferred.

OFFICERS—REMOVAL—CAUSE FOR.—The misconduct for which an officer may be removed from office must be found in his acts and conduct in the office from which his removal is sought, and must constitute a legal cause for removal, and affect the proper administration of the office.

OFFICERS—QUALIFICATIONS—PREVIOUS MISCONDUCT.—There is no restriction upon the power of the people to elect, or the appointing power to appoint, any citizen to office, notwithstanding his previous character, habits, or official misconduct. Nor is there any restriction upon the person elected or appointed to hold the office because of his previous misconduct in another office, in the absence of express constitutional or statutory provision to that effect.

OFFICERS—REMOVAL.—The mayor of a city cannot revoke the appointment of a city officer when once made, and neither he nor the common council of the city possess the power to remove such officer at will.

OFFICERS—REMOVAL—POWER OF COUNCIL.—When the absolute authority and entire responsibility of the appointment of a city officer for a fixed term are given by law to the mayor without power of removal at will or for cause the common council of the city has no inherent power to remove such officer. Such common council has only such power as it derives from express legislative enactments.

OFFICER—POWER TO REMOVE OFFICERS AT WILL excludes the power to put an officer to the expense of a trial for cause and have charges of official misconduct placed before the public.

E. F. Conely, J. C. Gates, and C. Flowers, for the appellants.

Hoyt Post and J. D. Conely, for the respondents.

362 GRANT, J. The relator, Speed, was duly appointed city counselor, and head of the department of law in the city of Detroit, July 15, 1893, and entered upon the duties of the office. This appointment was made under Act No. 419, Local Acts of 1893, entitled, "An act supplemental to the charter of the city of Detroit, and to provide for a law department in said city." Under the decision in *Speed v. Common Council*, 97 Mich. 198, Mr. Speed's appointment was declared valid, and the council directed to approve his bond. Thereafter the mayor of the city lodged charges with the common council against Mr. Speed, for which he asked said council to remove him. The council appointed a committee to investigate these charges, whereupon the relator filed this petition, asking for the writ of prohibition against the procedure of the council. The writ was granted, subject, however, to a motion to vacate it on cause shown. The respondents made answer to the petition, and moved to vacate the order. The principal question in the case is the power of the council to remove the city counselor for cause, but two preliminary matters will be first determined.

1. It is suggested, rather than seriously insisted, by the learned counsel for the respondents, that the writ of prohibition does not lie in the present case, for the reason that the common council was proceeding in a political or administrative way rather than in any other. They cite Mechem on Public Officers, secs. 1019, 1020; High on Extraordinary Legal Remedies, secs. 769, 783; *Burch v. Hardwicke*, 23 Gratt. 51; *People v. District Court*, 6 Col. 534; *Smith v. Whitney*, 116 U. S. 167. The rule laid down by these learned authors is that the **363** writ lies only to prevent the unauthorized exercise by courts and officers of judicial powers, and does not lie to restrain executive or ministerial action; and the above authorities, together with others, are cited in support of the proposition.

In *People v. District Court*, 6 Col. 534, the power to remove for certain causes was expressly conferred upon the city council of Leadville. No doubt, therefore, existed of the jurisdiction of the council in the matter.

In *Burch v. Hardwicke*, 23 Gratt. 51, the power was also expressly conferred by the charter upon the mayor to suspend or remove officers for misconduct in office or neglect of duty.

In *Smith v. Whitney*, 116 U. S. 167, the writ was invoked to prohibit the secretary of the navy, and a general court-

martial of naval officers, from trying the relator upon charges which had been preferred against him.

In all these cases the respondents were proceeding under the express authority of law, and they are, therefore, clearly inapplicable to the present case.

The writ lies "to prohibit the exercise, by an inferior tribunal or officer, of judicial powers, with which he is not legally vested," and "to prevent actions in excess of the jurisdiction conferred by law, and not to regulate or control the manner in which a lawful jurisdiction shall be exercised": Mechem on Public Officers, secs. 1013, 1014. Under the constitution the legislature may provide for the removal of municipal officers. It certainly has never been regarded in this state that the officer or body upon whom this power is conferred acts in a purely political, administrative, or legislative capacity. Such officer or body acts, and must of necessity act, in a *quasi* judicial capacity, and the method of procedure must be of a *quasi* judicial character: *Stockwell v. Township Board*, 22 Mich. 341; *Dullam v. Willson*, 53 Mich. 392; 51 Am. Rep. 128; *People v. Stuart*, 74 Mich. 411; 16 Am. St. Rep. 644; *Fuller v. Attorney General*, 98 Mich. 96. Such officer or body then becomes an ³⁶⁴ inferior tribunal, amenable to the writ of prohibition when acting in excess of the jurisdiction conferred. In such cases it is of little consequence what name is given to the power conferred. The name cannot relieve it of its essential character. It would be a reproach to the law if it did not provide a speedy remedy by which such tribunals can be prohibited from the exercise of an excess of authority, or of an authority which they do not possess. We are of the opinion that the writ lies in the present case: *State v. City of Duluth*, 53 Minn. 238, *post*, p. 595; *People v. Cooper*, 57 How. Pr. 416; 1 Dillon on Municipal Corporations, sec. 191, 4th ed., sec. 253.

2. While it appeared, upon the argument, to be conceded that the sufficiency of the charges is not here in issue, still, we deem it proper to say that the charges preferred, so far as they relate to the acts of Mr. Speed, committed before his appointment to, and induction into, this office are clearly beyond the jurisdiction of the respondents to determine. There is no provision in the constitution nor in the laws which prevents a person from holding office for misconduct in another office which he held prior to the one to which he was elected or appointed. We have been unable to find any

authority which justifies a removal for such previous misconduct. The misconduct for which an officer may be removed must be found in his acts and conduct in the office from which his removal is sought, and must constitute a legal cause for his removal, and affect the proper administration of the office. There is no restriction upon the power of the people to elect, or the appointing power to appoint, any citizen to office, notwithstanding his previous character, habits, or official misconduct: *State v. Common Council*, 25 N. J. L. 536; *Commonwealth v. Shaver*, 3 Watts & S. 338.

In *Commonwealth v. Shaver* it was held that the trial, conviction, and sentence of a sheriff for the offense of bribing a voter ³⁶⁵ previously to his election to the office did not disqualify him.

In *State v. Common Council*, 25 N. J. L. 536, it was held that the expulsion of an alderman for receiving bribes did not disqualify him for election to the same office: See, also, *State v. City of Duluth*, 53 Minn. 238, *post*, p. 595; *Crawford v. Township Boards*, 24 Mich. 248; *Richards v. Clarksburg*, 30 W. Va. 502; 1 Dillon on Municipal Corporations, sec. 190, 4th ed., sec. 252, and note.

This may be a proper subject for legislative consideration, but, until the legislature shall choose to disqualify persons from holding office for such reasons, they can constitute no cause for removal.

3. It was settled in the case of *Speed v. Common Council*, 97 Mich. 198, that the mayor could not revoke the appointment when once made, and that neither he nor the common council possessed the power to remove at will. That case was ably argued, and received the most careful examination by this court. We see no occasion to change our views, or to question the soundness of the conclusions then reached.

Counsel for respondents, in their brief upon the application for a rehearing in that case, concede that "there is no provision whatever for the removal of an appointive officer upon charges, nor for the trial of such charges"; but they contend, 1. That the power of removal is necessarily implied from the language used in the act of 1893; and 2. That the power of removal for cause is implied from the charter, and from the nature of the municipal organization.

The only reference to removal from office in the act of 1893 is found in section 8, which reads as follows:

"Upon the expiration of the term of office of the city counselor and the city attorney, or their resignation thereof, or removal therefrom, such officer shall forthwith, on demand, deliver to his successor in office all deeds, leases, contracts, and other papers and books in his hands belonging ³⁶⁶ to the corporation, or delivered to him by the corporation, or any of its officers, and all papers in actions prosecuted or defended by him, or which are pending and undetermined."

From this language it is argued that the power of removal for cause is necessarily implied, and the case of *State v. Somers*, 35 Neb. 322, is cited in support of the proposition. The provision of the statute of Nebraska then before the court for construction reads as follows:

"Said commissioner of health shall be appointed by the mayor, subject to the approval of a majority of the council, shall hold office for a term of two years from date of appointment, unless sooner removed or retired."

This statute was amended so as to read as follows:

"All officers appointed by the mayor and confirmed by the council shall hold the office to which they may be appointed until the end of the mayor's term of office, and until their successors are appointed and qualified, unless sooner removed, or the ordinance creating the office shall be repealed, except as otherwise provided in section 104."

Construing these provisions together, it was held that the right of removal was impliedly retained in the hands of the mayor, not in the council.

The difference between the two statutes is apparent. In that case the appointment was until the end of the mayor's term, unless sooner removed; while, in the present case, section 2 of the act conferring the power of appointment is as follows:

"He [the city counselor and the head of the legal department of the city] shall be appointed by the mayor, on or before the third Tuesday in June, for the term of three years, from the first day of July next succeeding his appointment."

In *State v. Somers*, 35 Neb. 322, the clause in regard to removal is coupled directly with the appointment, in the same section and the same sentence, and no other object than the removal of the officer is apparent from the language. But in this ³⁶⁷ case it is obvious that the sole purpose of section 8 is to provide for a surrender of the books and papers to their proper custodian in the event of a lawful successor to the

office; and it is fairly to be inferred that this purpose was in the legislative mind in adopting the enactment. Any other conclusion would do violence to the rules of construction. This act was supplementary to the charter of the city of Detroit, and its sole object was the creation of a new department. It is, in its character, an independent act, and, in the absence of controlling language referring to the charter, the language of the act must prevail. The character of this department and the office of the city counselor will be referred to hereafter.

There would be more force in this proposition of counsel if there were no officer mentioned in the act to which the term "removal" might apply; but the city attorney is elected, and, under the express provisions of the charter, may be removed for corrupt or willful malfeasance or misfeasance in office, or for willful neglect of duty, upon charges, which must be tried, and to which the officer shall have the right to make his defense: Charter, c. 4, sec. 18. This act recognizes the city attorney in his *status* as an elective officer, and therefore the provisions of the charter as to his amotion apply. But, as to the city counselor and the head of the legal department, he is a new officer created by the act, to be appointed under the act, whose duties are specifically defined by it, whose term of office is fixed, and whose appointment is lodged solely in the mayor. If the Nebraska case were applicable to the facts of this case it would follow that the power of amotion was lodged in the mayor to remove at will, and this question has been decided in *Speed v. Common Council*, 97 Mich. 198.

Is the power to remove the city counselor appointed under this act inherent in the municipal corporation or ³⁶⁸ in its governing body, the common council? Judge Dillon, in his valuable work on Municipal Corporations, section 181, fourth edition, section 242, states that the question of implied power of removal by municipal corporations has not been judicially settled in this country, and ventures the opinion that, in the absence of any express or implied restrictions in the charter, such power exists. It is also stated in the opinion in *Richards v. Clarksburg*, 30 W. Va. 496, decided in 1887, which is largely relied on by respondents' counsel, that the court was unable to find a single case in the United States where this question had been decided. The charter, in that case, appears to have been entirely silent in regard to the removal of officers, and particular stress seems to have been laid upon the broad

powers conferred by the statutes of West Virginia upon the common councils of towns and villages.

Under the facts of this case, however, we are not required to enter upon an extended discussion or determination of this question. The tendency of the decisions in this country is to regard municipal corporations as an aid to the state government, and to limit their powers to those which are expressly derived from the constitution and from legislative enactments, and to those implied powers only which are necessary to carry out the powers thus conferred. The highest tribunal in this country has declared the well-established rule on this subject in *Ottawa v. Carey*, 108 U. S. 121. Chief Justice Waite, speaking for the court in that case, said:

"Municipal corporations are created to aid the state government in the regulation and administration of local affairs. They have only such powers of government as are expressly granted them, or such as are necessary to carry into effect those that are granted. No powers can be implied, except such as are essential to the objects and purposes of the corporation as created and established": See, also, *Taylor v. Bay City etc. Ry. Co.*, 80 Mich. 77; *People* ³⁶⁹ *v. Hurlbut*, 24 Mich. 69; 9 Am. Rep. 103. In this latter case Mr. Justice Christiancy said:

"But the common council of the city is not the city, nor the legal entity known as the corporation of the city. It is itself but a public board for municipal governmental purposes, with just such powers (not forbidden by the constitution) as the legislature have thought, or may hereafter think, proper to confer."

In discussing the power of a common council to expel a member, the supreme court of New Jersey, in *State v. Common Council*, 25 N. J. L. 539, recognized the power of a corporation at common law to expel a member for sufficient cause, and in its opinion said:

"But the jurisdiction exercised in this case is not derived from the common law. The common council is not the corporation, and, whatever powers a municipal corporation may have to remove or expel a member for cause at common law, it is clear that the corporation itself has not by any by-law delegated any of them to the common council, and that body, therefore, cannot avail itself of the common-law jurisdiction vested as an inherent right in the corporation itself to expel

a member of their own body. The council derives its jurisdiction from the charter of the corporation."

It is argued that the power of removal of the city counselor is necessary in order properly to protect the interests of the city from an incompetent or corrupt incumbent, and therefore it must be inferred that the legislature recognized this power as existing. Courts may not surmise or speculate as to the causes or reasons for legislative enactments. With the reasons for conferring or withholding a power the courts have no concern. They must interpret the statute as they find it. The same argument was made in *People v. Woodruff*, 32 N. Y. 355. After stating the serious consequences which it was claimed would be entailed upon the community under the interpretation given, the court said:

370 "To obviate these alarming and startling results it is contended that we are to imply and infer an intent on the part of the legislature to have the power lodged in the comptroller, in the first instance, remain with, and to be exercised by, him whenever the exigency should arise which might call for it. It is a dangerous principle to imply power when it is not conferred by legislative authority in clear and distinct terms. It is always competent for the legislature to speak clearly and without equivocation, and it is safer for the judicial department to follow the plain intent and obvious meaning of an act rather than to speculate upon what might have been the views of the legislature in the emergency which may have arisen. It is wiser and safer to leave to the legislative department to supply a supposed or actual *casus omissus* than attempt to do it by judicial construction."

The position, character, and duties of the officer created by the act are important considerations upon the principle under discussion. He is required to be an attorney of five years' practice, to give a bond of five thousand dollars for the faithful performance of his duties, and to devote his entire time to the duties of the office. He must, therefore, abandon all his other legal business. He is made the legal adviser, not only of the common council, but of all the other departments of the city government and the boards thereof, except the board of police commissioners. It is apparent that the legislature contemplated that a man of high standing and character in his profession should be appointed to this important position. Is it unreasonable to infer that the legislature intended to place this important office beyond the control or

fear of any other department? That such a man should become incompetent, corrupt, and neglectful of his duties would be an exception to the rule. If it be said that the exception might arise, it may likewise be said that in the change of administrations, when the political complexion of the common council might change, false charges might be made for political purposes in order to ³⁷¹ remove the incumbent, and replace him by another of the same political faith as the council. Experience has demonstrated that there is at least as much danger of the one as of the other. These considerations may have had weight with the legislature. The reasons for a fixed term without the power to remove may have had greater weight with legislators than the risk of malfeasance or misfeasance on the part of the officer. They may well have deemed it important that the head of such a department should be free from all fear of removal or interference on the part of the common council. If, however, it was a *casus omissus* on the part of the legislature, it is one which the legislature and not the courts must supply.

No support for the position of respondents can, we think, be found in the charter itself. The subject of removals is completely covered by its provisions, and it excludes removals in any other manner than is there provided. Elective officers, with few exceptions, can be removed for cause. This, under the well-established rule, excludes the power to remove at will. Certain appointive officers, under the charter, can be removed at will, without charges or trial: Charter, c. 4, sec. 19. This likewise excludes the power to remove for cause. Where the power to remove at will is given, the law does not contemplate that the officer may be put to the expense of a trial for cause, and have charges of official misconduct placed before the public: *Dillon on Municipal Corporations*, sec. 183, 4th ed., sec. 245; *State v. Common Council*, 25 N. J. L. 536; *Speed v. Common Council*, 97 Mich. 198, and authorities there cited; *State v. Somers*, 35 Neb. 322; *Crawford v. Township Boards*, 24 Mich. 248. In *Mead v. Treasurer etc.*, 36 Mich. 416, 418, it is said:

"The general statute concerning removals contains no provision applicable to superintendents of the poor. Hence, there would seem to be no provision for the removal of these officers except the specific regulation in the supervisors' act. It would therefore seem that the legislature ³⁷² meant to confer on the supervisors a power to remove on the two speci-

fied grounds, but had no intention to give the right on any other ground, or to delegate to the supervisors a discretionary general power to remove. The provision in the supervisors' act, in so far as it applies to superintendents of the poor, would be rendered entirely gratuitous if a general authority to remove were to be implied, or should be considered as a consequence of the power to appoint."

It is also significant that the act gives the common council no voice, either in the appointment or confirmation of the city counselor. The absolute authority and the entire responsibility of his appointment are given to the mayor, without power of removal at will or for cause. There is nothing in the act which shows any intention on the part of the legislature to confer such power upon the common council; nor do we think such power is inherent in the council, which is the governing body of the municipal corporation, and derives its powers from express legislative enactments.

The motion to vacate the order must therefore be denied, with costs.

The other justices concurred.

THE WRIT OF PROHIBITION LIES to prevent a court from exceeding its jurisdiction in the exercise of its judicial functions: *Ex parte Braudlacht*, 2 Hill, 367; 38 Am. Dec. 593, and note; *North Yakima v. Superior Court*, 4 Wash. 655; *Bodley v. Archibald*, 33 W. Va. 229; *County Court v. Boreman*, 34 W. Va. 87. A writ of prohibition can only be invoked to restrain threatened acts which are judicial in their character: *City of Coronado v. San Diego*, 97 Cal. 440. See the notes to *Walcott v. Wells*, 37 Am. St. Rep. 494, and *Havemeyer v. Superior Court*, 18 Am. St. Rep. 248; also the extended note to *State v. Commissioners*, 12 Am. Dec. 604.

OFFICERS—REMOVAL OF MUNICIPAL OFFICER BY MAYOR OR COMMON COUNCIL.—A city council may be clothed with quasi judicial authority in connection with the removals from municipal offices: *Carter v. Durango*, 16 Col. 534; 25 Am. St. Rep. 294, and note, with the cases collected. But see *Hallgren v. Campbell*, 82 Mich. 255; 21 Am. St. Rep. 557. According to *Metsker v. Neally*, 41 Kan. 122; 13 Am. St. Rep. 269, the mayor of a city of the first class has no authority to remove a municipal officer in the absence of a statute or city ordinance conferring such power.

AN OFFICER forfeits his right to his office by acting contrary to the nature and duty of the office: *People v. Kingston etc. Turnpike Road Co.*, 23 Wend. 193; 35 Am. Dec. 551. Intoxication is not "misfeasance in office," and a statute pronouncing it such, and providing for the removal of the officer therefor, is unconstitutional: *Commonwealth v. Williams*, 79 Ky. 42; 42 Am. Rep. 204.

BRADLEY v. SMITH'S SONS.

[98 MICHIGAN, 449.]

SETOFF, WHAT NOT SUBJECT OF.—In an action by an assignee against a creditor of the assignor to recover on a claim or chose in action not due at the time the assignment was made the creditor cannot set off a claim against such assignor which was mature before that time.

SETOFF—ASSIGNMENT OF CLAIM.—One who buys or takes an assignment of a claim against another, not negotiable, takes it subject to such rights of setoff only as are due at the time of the transfer.

SETOFF, HOW CONSTRUED.—SETOFF is a statutory right in derogation of the common law, and must be strictly construed.

Hatch and Cooley, for the appellants.

McKnight, Humphrey, and Grant, and Oscar Adams, for the respondent.

449 **HOOKE**, J. The defendant was a creditor of one Doyle. On March 24, 1891, it and Doyle made a written contract, by which Doyle agreed to drive a quantity of logs for it. On the same day plaintiffs guaranteed said contract, "and the payment of the men promptly, by W. H. Doyle," in 450 writing, upon the contract, and in defendant's presence. Immediately below this guaranty was the following, viz:

"I hereby sell and assign to F. E. Bradley & Co. all my right, title, and interest in and to the within contract, and direct that all payments to become due on this contract to me be paid to them.

W. H. DOYLE.

"Dated March 24, 1891."

On April 7, 1891, a contract was made by telegraph between Doyle and the defendant, whereby Doyle was to "break in" the logs for twenty cents per one thousand feet. This contract was also assigned to plaintiffs, of which defendant was notified April 17th. Under these contracts Doyle earned two thousand two hundred and two dollars, of which three hundred and sixty-seven dollars was for breaking in. The first work was done April 23d. The plaintiffs offered evidence to show that the work was done at their expense; but this was excluded, and plaintiffs excepted. The defendant proved its claim against Doyle, amounting to fifteen hundred and twenty-four dollars and eighty-nine cents, which the court allowed to be set off against plaintiffs' claim, to which plaintiffs excepted.

This raises the question whether a creditor can set off against the assignee of a chose in action, not due at the time of the assignment, a claim which was mature before that time. Had both claims been mature, i. e., due and payable, at the time of the assignment, no doubt of the right to set off either could be entertained. And it is equally clear that if the assigned claim had been mature, an immature one could not be set off. We find numerous cases sustaining this proposition, and one of them (*Coffin v. McLean*, 80 N. Y. 563) apparently denies the right of setoff under the facts in this case. Mr. Justice Folger says:

“Nor is it [setoff] permitted, except when the demands are mutual; that is, where both were due and payable before the transfer of either to a third party.”

⁴⁵¹ In that case the claims sought to be set off were of two kinds. Some fell due before the assignment to the plaintiff and some after. The obligation sued upon was joint, while the claims sought to be set off were several; and this is one ground upon which that decision is based, and applies to all of the claims sought to be set off. The claims of the latter class were also open to the objection that they did not fall due until after the assignment. But the question of the right to set off a claim mature at the time of the assignment against a plaintiff assignee of an immature claim did not necessarily arise.

Three New York cases are cited to sustain the two reasons for the decision: *Beckwith v. Union Bank*, 9 N. Y. 211; *Patterson v. Patterson*, 59 N. Y. 574; 17 Am. Rep. 384; *Jordan v. National etc. Bank*, 74 N. Y. 467; 30 Am. Rep. 319. The cases of *Beckwith v. Union Bank*, 9 N. Y. 211, and *Jordan v. National etc. Bank*, 74 N. Y. 467, 30 Am. Rep. 319, were cases where the claims attempted to be set off matured after the assignment to the respective plaintiffs. That of *Patterson v. Patterson*, 59 N. Y. 574, 17 Am. Rep. 384, was where a bond was taken by plaintiff's testator, in his lifetime, conditioned to pay a sum to his executor after the testator's death. This was held to be a claim against which a debt due from the testator in his lifetime could not be set off. The opinion in this case was also written by Mr. Justice Folger. In demonstrating that the cause of action upon the bond did not arise until after the testator's death, he asserts that a cause of action does not arise from the contracting of an indebtedness alone, but out of the non-performance of it as well; and he cites authorities to sustain

the proposition that a cause of action does not run from the making of a promise to do some thing at a future time, but only from the expiration of that time. Were we to apply this logic to the present case we should be compelled to admit that, at the time of the assignment, the plaintiffs' assignor had no demand whatever, except a contract to be performed, whereby the defendant might later become indebted. Had ⁴⁵² the assignment not been made, the obligation would have matured immediately upon the performance of the contract by Doyle, and the right of setoff by either Doyle or the defendant would have been complete. In such case Doyle's subsequent assignment would not deprive the defendant of the right of setoff. But plaintiffs' contention is that if Doyle assigned his contract before it matured, though it were but an hour before, his assignee could collect the consideration, to the exclusion of the defendant's setoff. Doyle is permitted to sell his claim before it matures. Plaintiffs say to defendant: "We bought our claim against you before it was due, and, therefore, it was not the subject of setoff when we bought it. It is true that by the terms of your contract with Doyle you had a right to become Doyle's debtor, and all rights that we have acquired are those which Doyle had under the contract. We own the claim against you because we bought it, and we will collect it from you because when we bought it there was no claim against you. It not being due, there was no debt."

The right of setoff has its origin in the injustice of allowing a person to collect a debt when he is at the same time indebted to his debtor in a sum as large, or larger, than his own claim. And one who buys a claim against another, not negotiable, takes it subject to all rights of setoff due at the time of his purchase. If A buys a claim due to-day, B can set off a debt which is due. If, however, A has bought the claim half an hour before midnight, the rule is said to be otherwise, though it is difficult to see much difference in defendant's equities in the two cases.

It is urged that the assignor had merely a contract, which performance would ripen into a valid demand. This he sold, and plaintiffs took it with all its obligations and equities. As the assignor could not avoid defendant's right of setoff if he had kept it, and could not convey any ⁴⁵³ greater right than he had, it is said that plaintiffs took no more than the assignor could convey. Until performance, the plaintiffs had

no claim against defendant. Coincident with the maturity of the demand, the right of setoff attached. There is apparent force in this reasoning.

The case of *Stewart v. Anderson*, 6 Cranch, 203, is a case decided by Chief Justice Marshall, which seems to recognize the doctrine that the assignment of a claim before maturity does not relieve it from setoff. On April 25, 1807, A gave H a note, which came to the hands of plaintiff, Stewart, by assignment on August 14th, being before maturity, the note being due about October 25, 1807. On June 29, H gave A a note payable in sixty days, i. e., August 31, 1807. Stewart brought an action against A, who was allowed to set off his note against H. It will be observed that Stewart acquired a claim that was not due, yet the setoff was allowed, and this, too, though the note set off was not due; the case differing from, and going further than, this in that particular. It should be remembered that the act of the Virginia assembly under which this decision was made provided that—

"Assignments of bonds . . . shall be valid; and an assignee . . . may thereupon maintain an action of debt, in his own name, but shall allow all just discounts, not only against himself but against the assignor, before notice of the assignment was given to the defendant."

It was argued upon the trial that a claim "could not be a just discount until it became payable," and that "money cannot be offset before it be due."

This case appears to support defendant's contention. But it differs from the present case, in that there was a debt which had been assigned. It was not a case of executory contract, under which a debt might at a future time be created. True, this debt was not due, but the consideration had passed. The sum had been earned, as ⁴⁵⁴ the giving of the note implies. The maker of such note was a debtor before maturity, and the holder a creditor. Unless by reason of its negotiability, he could only dispose of such note subject to equities; and while we do not find it necessary to hold that the maker had an equity to the right to set off his existing claim, already due, when the note should mature, and do not so hold, we can see that such a conclusion, as in the Cranch case, falls far short of the doctrine that such right should apply to a case of a promise to pay at a subsequent date, when the promisee should have earned the amount. It is a difference between an existing obligation to pay money already earned,

at a future date, and an existing contract, where the debt does not exist, and will not, unless the consideration, whatever it may be, shall be performed. In the one case the holder of the promise to pay has an existing liquidated demand, contingent upon nothing, which he will inevitably have the right to demand and collect at the end of a specified time. In the other, he has no such demand, but an executory promise to pay upon the performance of some thing else. His right of action, when it accrues, may be a mere action for damages for a breach of contract. He could not set off such right if the promisor should sue him upon the cross-demand, and it is a matter which may never become a debt. The case in *Cranch*, under the Virginia statute, seems to have permitted setoff in the former case, but we have found no authority that extends the rule to the latter.

Furthermore, there is no opportunity to enlarge the doctrine of setoff. It is a statutory right, in derogation of the common law, and must be strictly construed: *Woods v. Ayres*, 39 Mich. 348; 33 Am. Rep. 396; *Robbins v. Brooks*, 42 Mich. 63. Section 7365, 3 Howell's Statutes, provides that, "in the following cases, . . . a defendant may set off demands which he has against the plaintiff." First, then, it must ⁴⁵⁵ be a demand as contradistinguished from a right of action: *Hanna v. Pleasants*, 2 Dana, 269; *Gould v. Kelley*, 16 N. H. 560; *Drew v. Towle*, 27 N. H. 412; 59 Am. Dec. 380; *Hepburn v. Hoag*, 6 Cow. 614. If the demand has been assigned to the plaintiff, a demand existing against his assignor at the time of the assignment, and belonging to such defendant before notice of assignment, may be set off, if it was such as might have been set off against the assignor while it belonged to him: 3 Howell's Statutes, sec. 7365, subd. 8. The language of this subdivision is a little blind, by reason of the use of the word "by," instead of "to," in the second line, but we think that its meaning is unmistakable. This claim of defendant was a proper subject of setoff against that of the plaintiff assignees only if it was such against the assignor while he was the owner of it. That it was not is plain, because this claim, i. e., that assigned, was not then due; and subdivision 5 provides that "it can be allowed only in actions founded upon demands which could themselves be the subject of setoff according to law." Under this provision, defendant's claim, though due, did not become a subject of setoff before the assignment, because the assignor never had a right of action upon a demand which could have

been the subject of setoff. As there never was a time, while Doyle owned the contract, when, under this statute, defendant's claim might have been set off against him, it is not such a demand as can be set off against the assignees: 3 Howell's Statutes, sec. 7365, subd. 8; *Richards v. La Tourette*, 53 Hun, 623; *Richards v. Village of Union*, 48 Hun, 263.

The evidence shows that the contract for driving the logs was altered before it was executed, at the suggestion of the plaintiffs, who were to guarantee performance by Doyle. The following language was inserted, viz:

"A payment of fifty cents per thousand is to be made when the jam has passed the east branch, and the balance ⁴⁵⁶ when the rear is within the boom company's limits. It is understood that the jam mentioned is of the T₂ logs."

The request of the guarantors that the defendant so amend the contract as to provide for payment in installments is significant. Evidently, they were providing a way for Doyle to obtain money to do the job with, and thereby lessening the danger of their being subjected to loss upon their guaranty. The defendant could not shut its eyes to this, and was in duty bound to inform the guarantors of its intention to apply the existing claim against Doyle, of which the guarantors were ignorant, in payment. This is the more apparent when we consider that the guaranty which defendant was exacting included the payment of the men who were to be employed by Doyle, and which defendant was insisting that the plaintiffs should assure. Under such circumstances as the plaintiffs claim to exist, the defendant would be estopped from setting off its claim upon the larger contract (if not both), which it had not disclosed, to the extent, at least, of the amount paid by plaintiffs; and this might be so although there was an express agreement, of which they were ignorant, between Doyle and the defendant, that the work should be performed and applied in payment of defendant's claim against him. The question of estoppel would be one for the jury, under all the facts which could be shown to bear upon it.

The judgment will be reversed, and a new trial ordered.

The other justices concurred.

ASSIGNMENT—ASSIGNEE TAKES SUBJECT TO WHAT EQUITIES AND OFFSETS. An assignee of a chose in action not negotiable takes it subject to all equities existing against it in the hands of the assignor at the time of the assignment: *Timms v. Shannon*, 19 Md. 296; 81 Am. Dec. 632, and note; *Beebe v. Bank*, 1 Johns. 529; 3 Am. Dec. 353; *Merrill v. Merrill*, 3 Greenl. 463;

14 Am. Dec. 247; *Jones v. Hardesty*, 10 Gill & J. 404; 32 Am. Dec. 180; *Foot v. Ketchum*, 15 Vt. 258; 40 Am. Dec. 678; *Warner v. Whittaker*, 6 Mich. 133; 72 Am. Dec. 65, and note; *Robeson v. Roberts*, 20 Ind. 155; 83 Am. Dec. 308, and note.

SETOFF—CONSTRUCTION OF STATUTE.—The statute relating to counter-claims ought to be liberally construed to the end that all controversies coming fairly within its terms may be settled in a single action between the parties: *Wait v. Wheeler etc. Mfg. Co.*, 23 Or. 297; note to *Woodruff v. Garner*, 89 Am. Dec. 484.

SETOFF—WHAT NOT SUBJECT TO.—Where an insolvent assigns for the benefit of his creditors a note past due, a court of equity will not set off, against such note in the hands of the assignee, an acceptance of the insolvent which was not due at the time of the assignment: *Lockwood v. Beckwith*, 6 Mich. 168; 72 Am. Dec. 69.

DEAN v. CRALL.

[98 MICHIGAN, 591.]

ESTOPPEL—PLEADING.—An estoppel *in pais*, constituting the basis of a right of action and ground of relief, or relied upon as a defense, must be pleaded in equity cases, but need not be pleaded in actions at law.

George S. Clapp and Spafford Tryon, for the appellant.

A. L. Hammond and M. L. Howell, for the respondent.

591 HOOKER, J. One Samuel W. Bishop executed to the plaintiff two promissory notes for two hundred dollars each. To these notes he forged the name of the defendant, Crall. For this crime it appears Bishop was convicted and sent to the penitentiary. Plaintiff and his attorney went one night, about eleven o'clock, to the house of the defendant, Crall, and under threats then made by them, he was induced to pay the notes. Crall afterwards sued plaintiff to recover the money so paid, on the ground that it was obtained from him by duress, and recovered judgment. Plaintiff then asked to have that judgment against him set aside, promising to pay the amount and costs if that was done. The judgment was set aside. Plaintiff paid **592** Crall the amount and costs thereof, and received back from him the notes here in controversy. Plaintiff thereupon brought this suit against Bishop and Crall, declaring upon the common counts alone. Defendant, Crall, demanded a bill of particulars, which was furnished, and contained only copies of these notes, with the statement that they constituted his cause of action in the case. Defendant

ant filed an affidavit with his plea, denying the execution of the notes.

Upon the trial, plaintiff sought to recover against Crall solely upon the ground of an estoppel. The estoppel is based upon the plaintiff's testimony that the defendant, Crall, once told him that the notes were all right; that he would stand by them and see them paid. This conversation took place March 3d. The payment by defendant to plaintiff under duress was made March 28th. The notes were received back from Crall August 12th, when plaintiff paid the amount of the judgment Crall had recovered against him.

We have carefully examined the evidence, and think that it does not show a state of facts which can be held to give rise to an estoppel. The notes were forgeries, and there is evidence that the defendant promised to pay them. The evidence is not very clear that the plaintiff was misled into the belief that the signatures were genuine, though perhaps that question was a proper one for the jury. But an estoppel cannot exist unless one is misled to his injury by reason of his belief in, and reliance upon, the representations alleged, and we find nothing of the kind here: *Palmer v. Williams*, 24 Mich. 328. We are not referred to any evidence tending to show that the plaintiff lost any opportunity to collect from Bishop, or was in any way worse off when he was told by the defendant that the notes were forgeries than he was at the time the promise to pay was made. It is argued that he might have attached the ⁵⁹³ property of Bishop, but the charge alone is cited to support the proposition. No proof is referred to, showing that he had either opportunity or desire to make his debt by attachment against Bishop.

It is contended that under the rule laid down in the case of *Gooding v. Underwood*, 89 Mich. 187, 190, and *Pearson v. Hardin*, 95 Mich. 360, it was necessary to set up the estoppel in the declaration. It is the settled rule in Michigan that in equity cases an estoppel *in pais* must be pleaded, where it constitutes the basis of a right to sue and ground of relief, or is relied upon as a defense: *Cicotte v. Gagnier*, 2 Mich. 381; *Moran v. Palmer*, 13 Mich. 367; *Connerton v. Millar*, 41 Mich. 608; *Dale v. Turner*, 34 Mich. 405. With the exception of the two cases cited, it is believed that it has not, in this state, been held necessary, in actions at law; and these cases are like the one at bar, where the respective causes of action were based solely and entirely upon estoppel. In England it was

formerly no uncommon thing to plead an estoppel by way of defense. Indeed, where the scheme of pleading was designed to eliminate unnecessary questions, and reduce the case to a single issue, it was a natural and proper course, and some cases have held that it was necessary to plead an estoppel of record. A similar practice prevailed to some extent in cases of estoppel *in pais*, and it seems to have been thought advantageous to do so, instead of proving it under the general issue: *Needler v. Bishop of Winchester*, Hob. 220 a; *Treviban v. Lawrence*, 2 Ld. Raym. 1051; *Sanderson v. Collman*, 4 Man. & G. 209; *Darlington v. Pritchard*, 4 Man. & G. 783; *Veale v. Warner*, 1 Saund., ed. 1871, 576, and note. In some of the American states an estoppel *in pais* can be given in evidence only when pleaded: *Clauser v. Jones*, 100 Ind. 123; *Wood v. Nicholls*, 33 La. Ann. 744; *Ransom v. Stanberry*, 22 Iowa, ⁵⁹⁴ 334; *Noble v. Blount*, 77 Mo. 242; *Warder v. Baldwin*, 51 Wis. 450. But at common law it seems to be settled that an estoppel *in pais* need not be pleaded, and whatever difference in the effect may have once resulted from a failure to plead it, none is now recognized: *Sanderson v. Collman*, 4 Man. & G. 220, 222; *Freeman v. Cooke*, 2 Ex. 662.

In many instances it is impracticable to plead estoppels, as they first come to light upon the trial, in answer to evidence not anticipated. That is, perhaps, not true in the two cases named, or in this case; but a case can easily be imagined where the claim of forgery might first come to the knowledge of the plaintiff upon the trial, and if a plaintiff were not convinced of its truth he might not care to amend his declaration if the opportunity were given. Again, it is somewhat illogical to say that the estoppel constitutes the cause of action. On the contrary, as shown in *Pearson v. Hardin*, 95 Mich. 360, it tends to establish the obligation alleged by way of an admission, which is receivable in evidence to establish the signature, which admission becomes conclusive of the fact when all of the elements of estoppel are present. We think, therefore, that the adherence to the rule mentioned would be unwise, and that these cases should be overruled in this particular.

The judgment must be reversed, and a new trial ordered.

MCGRATH, C. J., LONG and MONTGOMERY, JJ., concurred with HOOKER, J.

GRANT, J. I can see no good reason why the same rule

should not apply at law as well as in equity, where the sole ground of action is an estoppel. That it must be pleaded in equity is conceded. The object of pleading is to inform the defendant of the cause of action against him, and the ground upon which a recovery is sought. In *Gooding v. Underwood*, 89 Mich. 187, 190, the plain ⁵⁹⁵ issue presented by the declaration was the acceptance of an order. In the present case it was the making of a promissory note which was known by the plaintiff, before he brought suit, to have been forged. Clearly, therefore, he could not maintain an action on the note itself as against the defendant. It by no means follows that in every case an estoppel must be pleaded, and it may be conceded that plaintiff's counsel correctly state the general rule, that, where no opportunity to plead an estoppel is given, it may be given in evidence under the general issue. But this cannot be said of either *Gooding v. Underwood*, 89 Mich. 187, or the present case. It certainly must be very rare that the forgery of an instrument declared upon can come to the knowledge of the plaintiff at the trial. Under our practice, unless the execution of the instrument declared upon is denied under oath in an affidavit filed with a plea, its execution is admitted, and the plaintiff's *prima facie* case is made upon the production of the writing. Plaintiff, in such a case, has had no opportunity to plead an estoppel, and, whatever the defense set up upon the trial, the plaintiff may reply an estoppel without pleading. This rule seems to me to be founded in good sense.

But this is solely a question of practice, which should be settled, whenever possible, by the unanimous decision of the court. I therefore yield to the opinion of my brethren in the establishment of the rule that it is not necessary to plead an estoppel.

PLEADING AN ESTOPPEL IN PAIS, NECESSITY FOR.—This question is thoroughly discussed in the monographic note to *Tyler v. Hall*, 27 Am. St. Rep. 344.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

STEWART v. CASE.

[53 MINNESOTA, 62.]

A JUDICIAL OFFICER CANNOT BE CALLED TO ACCOUNT IN A CIVIL ACTION for his determinations and acts in his judicial capacity.

ASSESSORS—LIABILITY OF.—Assessors are *quasi* judicial officers, and, therefore, are not liable to a person injured by an excessive valuation of his property for the purposes of taxation, and the assessment not being impeachable in a collateral proceeding, an assessor cannot be held liable on the ground that he acted maliciously, and conspired and colluded with his assistants with intent to injure the plaintiff.

F. F. Davis, for the appellant.

Robert D. Russell, for the respondents.

⁶⁵ GILFILLAN, C. J. The defendants were assessor and assistant assessor of the city of Minneapolis. In each of several counts as a ⁶⁶ cause of action the complaint alleges that the defendants, acting in such capacities, wrongfully, unlawfully, willfully, and maliciously conspired, confederated, and agreed together with intent to injure the plaintiff, and to assess, and did so assess, certain of his real estate at certain sums, which it alleges to have been excessive, inequitable, and overvaluation, and that thereby he was compelled to pay, and did pay, for taxes, a certain sum in excess of what he ought justly and legally to have paid.

It is unquestionable, and has been from the earliest days of the common law, that a judicial officer cannot be called to account in a civil action for his determinations and acts in his judicial capacity, however erroneous or by whatever motives prompted. This rule and the reason for it are no-

where more clearly and emphatically stated than by Mr. Justice Cornell in *Stewart v. Cooley*, 23 Minn. 350, 23 Am. Rep. 690. The only question has been as to its application to officers whose duties are largely ministerial only, when they come to perform duties imposed on them in their nature judicial or quasi judicial, as is the case with an assessor under the tax laws. When he comes to determine the value of property he exercises a quasi judicial function; he must determine it upon his judgment. Judge Cooley, in his work on Taxation, page 786, lays it down that the exemption from private actions extends to assessors. If the rule protects such officers at all, it protects them for the same reason and to the same extent as in the case of judges of courts. There are but few decisions in which the question was directly involved. We are not referred to, and do not find, any holding that the exemption does not extend to such officers as assessors. The cases of *Weaver v. Devendorf*, 3 Denio, 117; *Barhyte v. Shepherd*, 35 N. Y. 238; *Western R. R. Co. v. Nolan*, 48 N. Y. 513; *Baker v. Allen*, 21 Pick. 382, hold that it does extend to them, and other decisions extend the rule to other officers when performing duties requiring the exercise of judgment: See *Harrington v. Commissioners*, 2 McCord, 400; *Freeman v. Cornwall*, 10 Johns. 470; *Sage v. Laurain*, 19 Mich. 137; *Van Steenbergh v. Bigelow*, 3 Wend. 42; *Burton v. Fulton*, 49 Pa. St. 151; *Harman v. Tappenden*, 1 East, 555; *Wall v. Trumbull*, 16 Mich. 228.

The same reason which justifies the rule of exemption in case ⁶⁷ of judges of courts applies to assessors, when they are determining the value of property for the purposes of taxation. Protection is not extended to the judge for his own sake, but because the public interest requires full independence of action and decision on his part, uninfluenced by any fear or apprehension of consequences personal to himself, except in so far as he may be accountable to the state for the manner in which he shall discharge the duties intrusted to him. It is also for the public interest that assessors, in determining values for purposes of taxation, should possess the same independence. If they were liable to have the considerations upon which they make their valuations impeached at the suit of every dissatisfied property owner, it is doubtful if men fit to hold the office could be induced to take it.

Upon both reason and authority, therefore, we hold that the exemption includes assessors in making assessments to the

same extent that it does judges in exercising their judicial functions.

The assessment being unimpeachable in this action, in contemplation of law the alleged agreement or combination to make an excessive assessment, even if in so agreeing defendants were acting outside their *quasi* judicial functions, did not result in any injury to appellant, and without injury the action cannot be maintained. If there were an overvaluation, the law affords another remedy.

Order affirmed.

VANDEBURGH, J., took no part in this decision.

JUDGES—CIVIL LIABILITY FOR JUDICIAL ACTS.—A judicial officer acting in the exercise of judicial functions is not liable for injuries caused by an erroneous decision: *Alexander v. Gill*, 130 Ind. 485; *Banister v. Wakeman*, 64 Vt. 203; *Pratt v. Gardner*, 2 Cush. 63; 48 Am. Dec. 652, and note; *Stone v. Graves*, 8 Mo. 148; 40 Am. Dec. 131, and note; *Busteed v. Parsons*, 54 Ala. 393; 25 Am. Rep. 688, and extended note. See, also, the extended notes to *Stewart v. Cooley*, 23 Am. Rep. 692, and *Yates v. Lansing*, 6 Am. Dec. 303.

CLARK v. ABBOTT.

[58 MINNESOTA, 88.]

A RECEIPT FOR THE FULL AMOUNT OF A DEBT ON A PAYMENT OF A SUM LESS than that due is a valid, irrevocable discharge of such debt if the money paid for the release was paid by a third person under no legal or moral obligation to discharge the debt, and in consequence of an agreement that such payment should constitute a complete satisfaction.

ACTION to recover moneys paid for certain lands which had been conveyed by defendant to plaintiff, with covenants against encumbrances, and of which the plaintiff had been deprived by foreclosure proceedings for the enforcement of a mortgage made by defendant prior to the transfer. After the liability of the defendant had accrued, his son-in-law paid plaintiff fifty dollars under an agreement that it should be accepted as a full satisfaction of all plaintiff's claim against the defendant. At the trial the court refused to instruct the jury that the receipt given by plaintiff and purporting to be in full satisfaction was, in the absence of fraud or mistake, conclusive in favor of the defendant, and the jury thereupon returned a verdict for the plaintiff. A motion having been made for a new trial, the court granted such motion because

of the error in denying defendant's proposed instruction respecting the receipt, and the plaintiff appealed from the order granting a new trial.

Roberts and Baxter, for the appellant.

A. D. Smith, for the respondent.

30 COLLINS, J. It is well settled that where the amount of a debt is undisputed, the receipt of a less sum from the debtor than the whole, upon an agreement to discharge the entire indebtedness is not a satisfaction, and that such an agreement is nonenforceable. There is no consideration, it is said, for the relinquishment of a part of the debt, and hence an agreement so to do is *nudum pactum*. But the principles which can be applied in such cases have no application in the case now before us. The respondent, Abbott, owed the debt in question. Wetherell was under no moral or legal obligation to pay any portion of it, but he offered to pay to the creditor, this appellant, the sum of fifty dollars in full of all claims against Abbott. The offer was accepted, the money paid, and the receipt given, "in full to date." Here was the act of a third person, who owed no duty in the premises, and the consideration essential to sustain the agreement was thus furnished. The technical reason for the application of the first rule mentioned, namely, an absence of consideration, no longer exists. When one not the debtor, nor under any legal or moral obligation to pay a debt, agrees to pay, and does pay, a sum less than the whole debt, in consideration of an agreement on the part of the creditor to satisfy and discharge the whole, no action will lie against the debtor to recover the balance of his indebtedness: See *Sonnenberg v. Riedel*, 16 Minn. 83; *Mason v. Campbell*, 27 Minn. 54; *Schmidt v. Ludwig*, 26 Minn. 85; *Laboyteaux v. Swigart*, 103 Ind. 596; *Varney v. Conery*, 77 Me. 527; *New York State Bank v. Fletcher*, 5 Wend. 85; *Brooks v. White*, 2 Met. 283; 37 Am. Dec. 95; *Welby v. Drake*, 1 Car. & P. 557; *Henderson v. Stobart*, 5 Ex. 99.

Order affirmed.

VANDEBURGH, J., absent, did not participate.

RELEASE.—WHEN ACCEPTANCE OF A SUM LESS THAN DUE OPERATES TO DISCHARGE WHOLE DEBT: See the note to *Gates v. Steele*, 18 Am. St. Rep. 269. Unless impeached for fraud or duress, or traversed as not genuine, a release under seal is a defense to an action, and the plaintiff will

not be heard to allege that it was without consideration, or that the amount paid was, in reality, not all that was due: *Spitze v. Baltimore etc. R. R. Co.*, 75 Md. 162; 32 Am. St. Rep. 378, and note. A written acknowledgment of money as received "in full" for a demand for unliquidated damages, is not within the rule which allows a simple receipt to be contradicted by parol, but is treated as a release, and, unless obtained by fraud, bars any further claim: *Coon v. Knap*, 8 N. Y. 402; 59 Am. Dec. 502. See, further, *Bliss v. New York etc. R. R. Co.*, 160 Mass. 447; *ante*, p. 504, and note.

LAYBOURN v. SEYMOUR.

[58 MINNESOTA, 105.]

- A DEMAND FOR THE PERFORMANCE OF A CONTRACT IS NOT NECESSARY to support an action to recover damages for its nonperformance, if the contractor from whom the performance was due upon demand had made an assignment for the benefit of creditors, and thereby disabled himself from performing his obligation.
- A SETOFF IS ALLOWABLE IN EQUITY AFTER THE INSOLVENCY of the person from whom the demand is due, though it is not within the statutes respecting the allowance of setoffs.
- A SETOFF IS ENFORCEABLE AGAINST AN ASSIGNEE FOR THE BENEFIT OF CREDITORS, if it is a demand which became due from the assignor at or before the making of the assignment.

ACTION by Charles G. Laybourn against the Flour City Sash and Door Company, a corporation, to recover moneys due for goods sold and delivered. The defendants pleaded a set-off arising out of an agreement made by the corporation to manufacture certain articles, and its failure to do so, which agreement had been assigned to defendants before the assignment by the corporation to plaintiff. The trial court refused to allow the setoff, and the defendants, after moving for a new trial, appealed from the order denying such motion.

Willis A. McDowell, for the appellants.

Charles G. Laybourn, *pro se*.

107 DICKINSON, J. At the time of the assignment by the insolvent corporation of all its property to this plaintiff for the benefit of its ¹⁰⁸ creditors the defendants were indebted to the corporation for goods sold to them. This is an action to recover the amount of that indebtedness. The defendants assert the right to set off a claim against the corporation which arose as follows: The corporation, by its treasurer and managing agent, had made an order, directed to the corporation, to deliver to one Fagan sash, doors, blinds, and mould-

ings to the amount of three hundred and seventy-five dollars. This was not signed, but across the face of it the corporation, by its proper agent, wrote its acceptance, with the further words, "Note received in settlement of open account." By assignment, this afterwards passed from Fagan to these defendants, who now seek to avail themselves of it by way of setoff. At the time the corporation made its assignment under the insolvent law this acceptance, as it may be called for convenience, had not been fully satisfied by a delivery of goods to the amount specified, nor had there been any demand for the delivery of the full amount of goods.

The unsigned order thus "accepted" by the corporation constituted an express agreement on its part to deliver goods as therein specified; but that was the extent of its obligation in the first instance. While the conditions remained as they were when it was issued, the corporation could not be called upon to pay the specified amount in money, nor could the "acceptance" have been available as a setoff, under the statute, against a debt due to the corporation, of the nature of that for which this action is prosecuted; but the making of the assignment under the insolvent law changed the situation and the legal rights of the holder of this instrument. The corporation thereby disabled itself from performing the specific obligation expressed in its written undertaking, and hence subjected itself at once to the alternative liability to answer in damages as for breach of contract. The law does not require the doing of a useless thing, and, the corporation having thus disabled itself to specifically perform its agreement, a demand was not necessary to convert the right to demand the goods into a right to compensation in money. The situation of defendants is the same as it would have been if, before the assignment in insolvency, they had demanded the goods, and the corporation, from inability to comply with the demand or from other cause, had refused to deliver the same.

¹⁰⁹ Such being the case, this demand was allowable as a setoff by the terms of the statute, which, "in an action arising on contract," allows, as a counterclaim or setoff, "any other cause of action, arising also on contract, and existing at the commencement of the action": Gen. Stats. 1878, c. 66, sec. 97.

But, by reason of the insolvency of the corporation, such a setoff is allowable in equity, even though the case be not within the statute. The equitable right of setoff, or "stop-

page," as it was formerly called, was not derived from, nor is it dependent upon, statutes (Waterman on Setoff, sec. 398; *Rothschild v. Mack*, 115 N. Y. 1, 8; *Becker v. Northway*, 44 Minn. 61; 20 Am. St. Rep. 543; *Freeman v. Lomas*, 9 Hare, 109, 113), although its exercise is limited to cases involving some distinct equity, independent of the mere existence of mutual, but unconnected, accounts or demands. The insolvency of the party against whose demand the other party claims the right of setoff has been recognized as affording a sufficient reason for allowing the setoff in equity, at least, where the debt sought to be set off is already mature: *Martin v. Pillsbury*, 23 Minn. 175; *Hunt v. Conrad*, 47 Minn. 557; *Lindsay v. Jackson*, 2 Paige, 581; *Richards v. La Tourette*, 119 N. Y. 54; *Pond v. Smith*, 4 Conn. 297; *Colt v. Brown*, 12 Gray, 233; *American Bank v. Wall*, 56 Me. 167; *Tuscumbia etc. R. R. Co. v. Rhodes*, 8 Ala. 206; *Krause v. Beitel*, 3 Rawle, 199; 23 Am. Dec. 113; *Chenault v. Bush*, 84 Ky. 528; *Richardson v. Parker*, 2 Swan, 529. Even if it be, as was considered in the late case of *Fera v. Wickham*, 135 N. Y. 223, that, in the case of an insolvent who has assigned his property for the benefit of creditors, a setoff will not be allowed of debts to the insolvent not due at the time of the assignment, that would not defeat the right of setoff in this case. The debt here sought to be set off became a money demand, presently due, at the very instant when the assignment was made.

Our conclusion is that the defendants were entitled to have their demand set off against that of the plaintiff, and the order denying a new trial must be reversed.

VANDEBURGH, J., did not take part in this case.

CONTRACT—NONPERFORMANCE—DAMAGES.—A contract to pay in specific articles of personal property becomes a money debt only after a demand and refusal to pay over the specified property, and no money judgment can be rendered on such contract until that time: *Weil v. Tyler*, 38 Mo. 545; 90 Am. Dec. 441, and note. See, also, the extended note to *Johnson v. Evans*, 50 Am. Dec. 679.

SETOFF AGAINST ASSIGNEE OF INSOLVENT.—Where an insolvent makes an assignment for the benefit of creditors of a note past due, a court of equity will not set off against such note in the hands of the assignee an acceptance of the insolvent, which was not due at the time of the insolvency: *Lockwood v. Beckwith*, 6 Mich. 168; 72 Am. Dec. 69.

STATE v. WOLFER.

[58 MINNESOTA, 135.]

A PARDON MAY IMPOSE ANY CONDITION that the governor thinks proper, provided it is neither immoral, impossible, nor illegal.

A PARDON ON CONDITION that the prisoner take up and maintain his residence out of the state during the balance of his life does not impose any impossible, immoral, or illegal condition. Such condition is therefore valid.

AFTER A CONDITIONAL PARDON, THE PRISONER CANNOT BE RECOMMITTED TO THE STATE PRISON WITHOUT ANY HEARING or adjudication upon the mere order of the governor, who has sought to determine *ex parte* that the condition has not been performed.

AFTER A CONDITIONAL PARDON, IF IT IS CLAIMED THAT THE PERSON PARDONED HAS NOT COMPLIED WITH THE CONDITION, he must be brought before the court to show cause why execution should not be awarded on his original sentence, and then the court has jurisdiction to inquire and determine whether he is the same person who has been pardoned, and if so, whether he has violated the condition of the pardon. He may, on his part, present any facts constituting an excuse for non-performance of the strict terms of the condition. It is not necessary that he should be proceeded against by indictment or tried by a jury. The court may, if it chooses, submit to the jury an issue as to whether or not he is the prisoner formerly convicted and pardoned; but if it is found or admitted that he is the same person, no other or greater formalities are required in reiterating the sentence, and returning him to imprisonment under it, than when he was brought up for his original sentence.

HABEAS CORPUS.—IF A PRISONER HAS BEEN PARDONED WITH CONDITION that he leave the state, and has again been placed in prison without any judicial inquiry, on the ground that he has violated the condition of his pardon, he must be discharged on *habeas corpus*, if the court before which he is brought is not a court of original criminal jurisdiction, and without entering into a consideration whether he has complied with his pardon or not. Such discharge will not bar further proceedings instituted in a proper court for the purpose of there determining whether he should not be again imprisoned, because his pardon had become inoperative for his failure to comply with the condition upon which it was granted.

PETITION for a writ of *habeas corpus* directed to the warden of the state prison to compel him to bring Thomas O'Connor before the court, with the authority of his imprisonment. The prisoner had been pardoned on condition that he immediately leave, and remain beyond, the state. After his release he directed his wife to dispose of his property, and to join him. She sold the property as directed, and met him for the purpose of leaving the state, and, as they were about to take the train, she was stricken with paralysis. He gave her such attention as he could, and concealed himself in the

vicinity to avoid the public. Three days later, while endeavoring to reach a train, and take passage out of the state, he was arrested, and placed in confinement on the theory that he had forfeited the benefit of his pardon by noncompliance with its condition.

H. H. Gillen and J. C. Nethaway, for the petitioner.

H. W. Childs, attorney general, for the state.

137 MITCHELL, J. As the respondent traversed none of relator's allegations of fact, the petition for the writ must, for the purposes of this hearing, be taken as true. Therefore, no statement of facts other than a reference to this petition is necessary.

138 That the pardon granted to relator was conditional, and that the condition was a valid one, cannot admit of doubt. The power to grant conditional pardon is conceded. The statute (Gen. Stats. 1878, c. 119), which is but declaratory of the common law, expressly so provides.

A pardon being wholly a matter of mercy, the governor may impose any condition that he pleases, at least provided it is neither immoral, impossible, nor illegal. The condition in this case, to wit, that the prisoner "take up his residence out of the state, and maintain the same outside of the state during the balance of his life," was neither immoral, impossible, nor illegal. The fact that this condition precedes the operative part of the pardon, which, if taken by itself, would be unconditional, is unimportant. Taking the whole instrument together, it is perfectly evident that the intention was that the pardon should be subject to this condition.

It appears that about a week after the pardon had been issued, and the relator discharged, the governor, without giving him any opportunity to be heard, issued his order to the warden of the penitentiary by which, after assuming to recite the condition of the pardon, and the nonperformance of it by the relator, he declared the pardon null and void, and directed the warden to arrest the relator, and return him to the state prison, to be there kept in confinement, in accordance with the judgment of the court before which he had been convicted; that upon the authority of this order alone, the relator was shortly afterwards arrested, and without any trial or hearing in court or otherwise, and, without being given any opportunity to be heard as to whether he had violated the

conditions of his pardon, was returned to the state prison, where he is still confined.

The main question, and the one which presents itself at the threshold of this case, is whether a person who has been discharged on a conditional pardon can be recommitted to the state prison without any hearing or adjudication, upon the mere order of the governor, who has assumed to determine *ex parte* that the condition of the pardon has not been performed. It seems to us that such a course is warranted neither by law nor by a just regard for the personal liberty of the citizen. It is, of course, well settled that if a person be pardoned upon a condition, either precedent or subsequent, which he neglects to ¹³⁹ perform, the pardon is void, and he may be remanded to suffer his original sentence; but upon the question whether he has neglected to perform the condition, and is therefore liable to be thus remanded, he is entitled to a hearing and adjudication. As a pardon is wholly a matter of mercy, we are not prepared to hold that the legislature may not provide that in case of a conditional pardon the governor may, even without giving the person an opportunity to be heard, determine whether the condition has been violated, and, if he determines that it has, remand him to the state prison; and it may be that, even in the absence of any statute, the governor would have the right to insert such a provision or condition in the pardon itself, for it might well be argued that the statute in the one case, and the express provision of the instrument itself in the other, constituted a condition to which the prisoner voluntarily subjected himself by the acceptance of the pardon: See *Kennedy's case*, 135 Mass. 48, and *Arthur v. Craig*, 48 Iowa, 264; 30 Am. Rep. 395.

But the pardon in this case contained no such condition, and our statute is entirely silent as to the mode of procedure. The procedure, therefore, in such cases, is governed by the rules of the common law. We have carefully examined all the cases within our reach, both English and American, and find that, except where otherwise provided by statute (as in Massachusetts), the uniform practice from the earliest date has been that, upon complaint that the person has not performed the condition of his pardon, a warrant is issued, upon which he is arrested, and committed to jail until he can be brought before the court for a hearing; that thereupon an order, rule, or some such process (the precise form of which

is not very material), issued by the court in which he was convicted (or some superior court of criminal jurisdiction), he is brought before the court to show cause why execution should not be awarded against him on his original sentence. The record of his conviction is then produced. The first thing is that it must appear that he is the same person. If he pleads that he is not, a *venire* to try that fact is awarded. If the jury find, or if he confess, that he is the same person, then there may be other questions (according to the nature of the condition of the pardon) for the consideration of the court, as, for example, in this case, whether the prisoner had had a reasonable time within which to remove from ¹⁴⁰ the state, or whether he had been necessarily delayed in doing so by reason of the sickness of his wife. On all such and similar matters touching the question whether he had failed to perform the condition of his pardon, the prisoner is entitled to be heard, just as he was entitled to be heard why sentence should not be passed on him when he was originally brought before the bar of the court for sentence after verdict. It is competent for the prisoner in such cases to present any facts constituting an excuse for nonperformance of the strict terms of the condition, as, for example, extreme poverty or sickness; and, if the court is of the opinion that such impediments amount to a lawful excuse, he should be discharged: *Aickles' case*, 1 Leach's Crown Cases, 390; *Thorpe's case*, 1 Leach's Crown Cases, 396, note. If the court is in doubt in regard to the facts which rest *in pais*, it has been sometimes the practice to take the verdict of a jury. This was done in *Thorpe's case*, 1 Leach's Crown Cases, 396, note. But, while we have no doubt of the right of the court to do this, we are of opinion that the prisoner is not entitled to the verdict of the jury as a matter of right. According to the course of common-law practice, the only issue that must be tried by a jury is whether the prisoner is the same person who was convicted. The reason for this is that otherwise a person might be remanded to suffer punishment who has never been tried by a jury. But, if it be found or admitted that the prisoner is the same person, no other or greater formalities are required in reiterating the sentence, and returning him to imprisonment under it, than were required when he was brought up for original sentence.

The contention of relator's counsel, based principally upon the authority of *People v. Moore*, 62 Mich. 496, that a pardoned

convict, charged with having violated the conditions of his pardon, must be arrested and tried in the same manner—that is, upon an indictment and by a jury—as other offenders against the law, is, in our judgment, not only contrary to the course of the common law from the earliest times, but proceeds upon an entirely erroneous theory as to the *status* of a person released upon a conditional pardon, and as to the nature of proceedings to remand him to imprisonment upon nonperformance of its conditions. If the violation of the conditions was a crime, as it is in certain cases in some jurisdictions, and if the person was ¹⁴¹ charged with that crime, of course he would have to be tried in the same manner as those charged with any other offense; and, if a second or new conviction of the original offense was necessary, the same thing would be true. But the nonperformance of the condition of a pardon is not an offense. Neither is there any second trial and conviction of the prisoner for the original offense. He had been already tried and convicted of the crime of which he was conditionally pardoned, and, if he violates the condition, the pardon is altogether void, and he is remanded to suffer his original, and not a new, sentence for the crime (and not some other) of which he had been already convicted. Without multiplying authorities, we merely refer, in support of our views, to *People v. Potter*, 1 Park. Cr. 47, where the earlier cases, both English and American, are quite extensively cited and commented upon.

Counsel, however, makes the point that upon relator's own showing in his petition he had violated the condition of his pardon, and therefore, even if the means by which he was returned to the state prison were unlawful, still he ought to be remanded to the custody of the warden.

We are not prepared to say that where a person who has been thus returned to prison in an illegal manner sues out a writ of *habeas corpus* before a court of competent original criminal jurisdiction, such court may not, on the return to the writ, hear and determine the question whether the condition of the pardon had been performed, and if the fact be adjudicated adversely to the prisoner, remand him to suffer his original sentence.

But this is not a court of original criminal jurisdiction, and will not enter into the consideration of any such questions, but will merely inquire whether the relator's present detention is by authority of law, and if it is not, order his discharge.

Of course, such discharge is no bar to the institution of further proceedings in behalf of the state in the proper court, in the manner already indicated, to have the party remanded to prison. We will also add that we do not think that it necessarily follows, by any means, from the allegations of relator's petition that he had failed to perform the condition of his pardon. The governor's order recites that the condition was that he should immediately leave the state. This is incorrect. It was that he should "take up his residence ¹⁴² out of the state," etc. No time being specified, he had what would be, under all the circumstances, a reasonable time. We do not care to enter into any extended discussion of the facts, but we suggest that it appears that he had a family in a distant part of the state; also that one of the expressed reasons for granting the pardon was that he might care for his family, who, it must have been expected, would either accompany or shortly follow him to his new residence; also, that he had some property to be disposed of; further, that while he and his family were preparing to leave the state, and were about ready to start, his wife was suddenly taken dangerously ill, which further delayed his intended departure. In view of all these facts, it is at least an open question whether more than a reasonable time for leaving the state had elapsed, and if so, whether he had a lawful excuse for not leaving sooner.

It is ordered that the relator be discharged from custody.

VANDERBURGH, J., absent, took no part.

PARDONS—CONDITIONAL.—VALIDITY OF: See the extended note to *State v. McIntire*, 59 Am. Dec. 576. A conditional pardon is vacated upon failure of the convict to perform the whole of the condition: *State v. Addington*, 2 Bail. 516; 23 Am. Dec. 150, and note. Where a pardon is granted on condition that the prisoner leave the state and never return, upon his failure to comply, he may be rearrested if he has had ample opportunity to leave the state and has not done so: *Ex parte Marks*, 64 Cal. 29; 49 Am. Rep. 684; *State v. Barnes*, 32 S. C. 14; 17 Am. St. Rep. 832, and note.

PARDON ON CONDITION—BREACH—RECOMMITMENT.—Where a prisoner has been pardoned on a certain condition, upon a breach of the condition the governor may revoke the pardon and recommit the recipient: *Arthur v. Craig*, 48 Iowa, 264; 30 Am. Rep. 395. A prisoner pardoned on condition that he leave the state and not return, is remitted to his original sentence, and is not entitled to trial by indictment, or on a written rule to show cause, or to receive any more formal notice that an application would be made to pass sentence on him, than when his sentence was originally passed: *State v. Chancellor*, 1 Strob. 347; 47 Am. Dec. 557, and note.

ALAIR v. NORTHERN PACIFIC RAILROAD COMPANY.

[53 MINNESOTA, 160.]

CARRIERS.—A CONTRACT SPECIFYING THAT THE VALUE OF PROPERTY DOES NOT EXCEED A SUM NAMED, and that in the event of its loss through the negligence of a carrier the liability should be limited to such sum, if fairly and honestly made as a basis of the carrier's charges and responsibility, is a just and reasonable mode of securing the due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting him against extravagant and fanciful valuations, and is, therefore, valid.

John H. Mitchell, Tilden R. Selmes, and William Allen Butler,
for the appellant.

Lawler, Durment and Bigelow, for the respondent.

¹⁶² MITCHELL, J. The complaint alleges the delivery by plaintiff to defendant, a common carrier, of eighteen horses for transportation; ¹⁶³ that seven of the horses, of the value of two thousand one hundred dollars, were, while in transit, killed through the negligence of the defendant. Judgment is asked for two thousand one hundred dollars.

The answer admits the delivery and receipt of the horses for transportation, their value, and their loss through its negligence, as stated in the complaint, but alleges that the property was delivered and received upon a special written contract, executed by both parties, containing the terms and conditions on which the defendant undertook to transport it, one of which was that "it is hereby further agreed that the value of the livestock to be transported does not exceed the following mentioned sums, to wit: Each horse, one hundred dollars; each ox, fifty dollars; each bull, fifty dollars; each cow, thirty dollars; . . . such valuation being that whereon the rate of compensation to this company for its services and risks connected with said property is based." The answer further alleges a tender of seven hundred dollars, which is kept good by bringing the money into court. This appeal is from an order sustaining a demurrer to the answer on the ground that the facts stated do not constitute either a defense or counterclaim.

The sole question is whether this stipulation as to the value of the property is valid and binding, so as to limit the amount of plaintiff's recovery when the loss occurred through defendant's negligence. As against plaintiff's demurrer it must be

assumed that this stipulation was fairly made, and for the purposes therein expressed.

How far, or in what respects, a public carrier of goods may limit his common-law liability is by no means a new question in the courts. At common law he was practically an insurer of the property. The rule imposing this extraordinary liability had its origin in considerations of public policy; and, as the duties of a common carrier are public in their nature, in the due performance of which the public at large, as well as the particular shipper, have an interest, and as the carrier and the shipper do not stand on a footing of equality, the latter often having no choice but to accept such conditions as the former might impose, the tendency of the courts formerly was to hold that it was against public policy, or, as otherwise expressed, not just and reasonable, to permit a common carrier to stipulate for any modification of his common-law liability, even by special contract with his customer.

¹⁶⁴ But in course of time the improved state of society, the introduction of better and safer modes of transportation, the diminished opportunities of collusion and bad faith on part of the carrier, and other considerations, rendered less imperative the rigorous application of the iron rule of the common law. The result has been that the courts now uphold as just and reasonable numerous limitations to, or exemptions from, the common-law liability of carriers, which would formerly have been held against public policy, and void.

In fact, it has now become the accepted general business usage (which is itself strong evidence as to what is in accord with public policy) for carriers and shippers to contract for some exemptions from the strict liability imposed by common law. At one time the courts in England had gone so far as to hold that public carriers might by special contract, and even by public notice, relieve themselves from liability for the consequences of the gross negligence, or even felony, of their servants.

This led, in 1854, to the passage of the act commonly called the "Railway and Canal Traffic Act," declaring that such carriers should be liable for loss occasioned by their own neglect or default, or that of their servants, notwithstanding any notice, condition, or declaration to the contrary, but providing that they might make such conditions with respect to the carriage of goods as should be adjudged "just and rea-

sonable" by the court or judge before whom the case should be tried. It is significant of the views of parliament as to what conditions would be just and reasonable, and hence in accordance with public policy, in case of the transportation of livestock, that this same statute provides that no greater damages shall be received for any animal than certain specified sums (presumably fixed with reference to the average value of ordinary animals), unless a higher value is declared by the shipper at the time of delivery. This is perhaps not without some weight in considering the justness and reasonableness of the conditions or stipulations of the contract now before us.

It would hardly be in point to consider the English decisions under this statute as to what conditions are or are not "just and reasonable," further than to say that beyond a doubt they would uphold the validity of the one now under consideration.

¹⁶⁵ In the United States, at least since the case of *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, it has been the universal law of this country that, in the absence of a statute prohibiting it, any common carrier may, by special contract, limit his common-law liability, provided the contract is "just and reasonable in the eye of the law." We adopt this form of statement advisedly, for in all the cases the ultimate test applied by the courts in determining whether a condition limiting the common-law liability was or was not against public policy has been whether, under all the circumstances, it was or was not just and reasonable in the eye of the law. In the leading case of *Railroad Co. v. Lockwood*, 17 Wall. 357, the court placed its decision, that a carrier could not stipulate for exemption from responsibility for the negligence of himself or his servants, upon that express ground. The English statute already referred to, in using the expression "just and reasonable," but adopted the existing rule of law. The right of the common carrier to limit his common-law liability by special contract was fully recognized by this court as long ago as *Christenson v. American Express Co.*, 15 Minn. 270, 2 Am. Rep. 122; but, in accord with the great weight of authority in this country, we have held that he cannot contract for exemption, either in whole or in part, from liability for the negligence of himself or his servants; that such an exemption is against public policy, because it would enable him to put off the essential duties of his public employment:

Christenson v. American Express Co., 15 Minn. 207; 2 Am. Rep. 122; *Shriver v. Sioux City etc. Ry. Co.*, 24 Minn. 506; 31 Am. Rep. 353; *Ortt v. Minneapolis etc. Ry. Co.*, 36 Minn. 396; *Moulton v. St. Paul etc. Ry. Co.*, 31 Minn. 85; 47 Am. Rep. 781; *Boehl v. Chicago etc. Ry. Co.*, 44 Minn. 191.

The case, therefore, comes down to a question of the construction to be placed on this stipulation. If the purpose of it was merely to place a limit on the amount for which the defendant should be liable, then, clearly, as to losses resulting from negligence, it is not just or reasonable, and is not binding on the plaintiff. On the other hand, if it was a stipulation as to the value of the property, fairly and honestly made as the basis of the carrier's charges and responsibility, then we think it ought to be upheld ¹⁶⁰ as a just and reasonable mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations.

At this point we may suggest that, so far as the question now under consideration is concerned, we see no difference between a case like the present, where the stipulation is that the value of the property does not exceed a specified sum, and one where the value is stipulated to be a specified sum; also, that it makes no difference whether the valuation expressed in the contract is one previously named by the shipper on requirement of the carrier, or one inserted in the contract by the carrier without being named by the shipper, but acquiesced in by him. In either case it becomes a part of the contract on which the minds of the parties meet, and on which they act. Also, if the purpose of the stipulation is a lawful and proper one, the mere fact that it may incidentally have the effect of limiting the amount of the carrier's liability in case of loss caused by negligence will not render it invalid.

Contracts of this kind, relating to the transportation of live-stock, are very common, and their reasonableness, at least as applied to that class of property, seems to us quite apparent. Every one may be presumed to know approximately the average value of ordinary domestic animals, but it is well known that many animals have a special value because of some peculiar qualities—such as speed or pedigree—which are not apparent from mere inspection. For example, a horse which, to one not acquainted with it, might not appear to be worth more than any ordinary horse, might, because of speed,

be worth ten thousand dollars. The agents of common carriers are not expected to be, and usually are not, experts as to the special or peculiar value of particular animals. Ordinarily, they would know nothing about the matter except what they learned from the shipper's statement. Presumably the charges for transportation are to a considerable extent based on the value of the property. Moreover, the measure of care on part of the carrier will naturally be commensurate with the value of the property intrusted to him. Consequently the law always required entire good faith on part of the shipper in stating the nature and value of property delivered to a carrier for transportation. Even when the common-law liability of ¹⁶⁷ carriers was enforced most rigorously, the courts always upheld limitations of it imposed for the purpose of procuring a full disclosure of the value of the property, especially of articles of unusual value, or subject to extra hazard. This is illustrated in that numerous class of cases where packages whose contents were not open to inspection were delivered to an express company or other carrier by the owner, who accepted a receipt therefore containing a condition that in case of loss the holder should not demand beyond a specified sum, at which the article was thereby valued, unless a greater value was expressed or declared. But we see no difference in principle between a case where the value of the property is unknown to the carrier because inclosed in a box and one where it is unknown because dependent on latent qualities not ordinarily ascertainable by inspection. We think we are justified in taking judicial notice of the fact that the maximum values placed by this contract on different kinds of domestic animals are approximately those of average ordinary animals in the country through which defendant does business. By executing this contract the plaintiff stipulated, and in effect represented to defendant, that his horses were not worth to exceed one hundred dollars each, and that the charges for transportation should be based on that valuation. Assuming, as we must, that the contract was fairly made for the purposes expressed in it we think it ought to be upheld as just and reasonable. It is not in any proper sense a contract for exemption from the consequences of negligence. In this view we are sustained by the great weight of authority: *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331; *Squire v. New York Cent. R. R. Co.*, 98 Mass. 239; 93 Am. Dec. 162; *Graves v. Lake Shore etc. R. R. Co.*, 137 Mass. 33; 50 Am. Rep. 282;

Hill v. Boston etc. R. R. Co., 144 Mass. 284; *South & North Alabama R. R. Co. v. Henlein*, 52 Ala. 606; 23 Am. Rep. 578; *Louisville etc. R. R. Co. v. Sherrod*, 84 Ala. 178; *Harvey v. Terre Haute etc. R. R. Co.*, 74 Mo. 538; *Louisville etc. Ry. Co. v. Sowell*, 90 Tenn. 17; *Duntley v. Boston etc. R. R. Co.*, 66 N. H. (July 26, 1890).

We cite no cases from jurisdictions where contracts for exemption from liability for negligence are upheld, as they would not be in point in this state.

¹⁶⁸ In fact, it will be found that there are very few authorities against our views. Most of the cases, usually carelessly cited as authority on the other side of this question, will be found, on careful examination, to be clearly distinguishable and not in point. In some of them the stipulation was purely and solely one arbitrarily limiting the amount of recovery, without regard to the value of the property, as in *Moulton v. St. Paul etc. Ry. Co.*, 31 Minn. 85; 47 Am. Rep. 781. In others it was held that the shipper never agreed to the limitation, and for that reason was not bound by it. In others the decision was expressly placed on the ground that both parties knew that the property was of much greater value than that stated in the contract, and arbitrarily inserted a sum grossly disproportionate to the true value solely for the purpose of limiting the amount of the carrier's liability.

Counsel for plaintiff relies on *Moulton v. St. Paul etc. Ry. Co.*, 31 Minn. 85, 47 Am. Rep. 781, and *Boehl v. Chicago etc. Ry. Co.*, 44 Minn. 191, as settling the law in this state in his favor. The *Moulton* case, for a reason already suggested, is not in point, and in that very case this court recognized the right of the parties to agree upon the value of the property, or to fairly liquidate the damages, in case of loss, in accordance with the supposed value, and also recognized the right of the carrier to require the disclosure by the shipper of the value of the property, to the end that proper care might be taken of it, and that the amount of charges for transportation might be fixed. The *Boehl* case makes no allusion to any such stipulation in the contract, and contains nothing to indicate that the point was the basis of the decision, or even in the mind of the court.

A reference to the record in that case shows that the contract contained a stipulation somewhat similar to that in this case, but that, while the point that plaintiff's recovery should be limited to the amount specified was made on the trial by

a request to charge, the prominent issue, aside from that of the defendant's negligence, was whether the alleged contract containing this provision was in fact plaintiff's contract, and the briefs of counsel show that the point was barely alluded to on the argument in this court; hence, we do not consider the case as an authority controlling the present one.

Counsel for plaintiff have argued this case on the assumption that defendant knew at the time of the shipment of the property that ¹⁶⁹ these horses were actually worth two thousand one hundred dollars, but there is no warrant for this. It by no means follows, because defendant now knows and admits their value to have been two thousand one hundred dollars, that it knew that fact when it received the property. What would be the effect if defendant then knew that fact is a question not now before us, and which we are not called on to decide. We may say, however, that if both parties, knowing the actual value of the property, arbitrarily insert in the bill of lading a much less sum, grossly disproportionate to the real value, for the purpose of limiting the liability of the carrier for the consequences of its negligence, the stipulation would be invalid.

Order reversed.

VANDEBURGH and COLLINS, JJ., absent, took no part.

CARRIERS—VALUATION OF ARTICLES—LIMITING LIABILITY FOR NEGLIGENCE TO THAT AMOUNT.—While a common carrier cannot, by contract, limit its liability for negligence, it may, by contract with the shipper, fix the value of goods intrusted to it for shipment, and estop him from claiming that they were of greater value, in an action to recover compensation for their loss through such negligence: *Ballou v. Earle*, 17 R. I. 441; 33 Am. St. Rep. 881, and note; *Pacific Express Co. v. Foley*, 46 Kan. 457; 26 Am. St. Rep. 107, and extended note. The question involved in the principal case is thoroughly discussed in the extended note to *Chicago etc. Ry. Co. v. Chapman*, 23 Am. St. Rep. 593.

STATE v. CITY OF DULUTH.

[53 MINNESOTA, 233.]

CERTIORARI LIES TO REVIEW THE PROCEEDINGS OF THE COMMON COUNCIL OF A CITY in removing a member of the board of fire commissioners where such removal is authorized to be made for sufficient cause, and after charges have been preferred and a hearing given to the accused officer.

ON CERTIORARI THE COURT WILL CONSIDER THE EVIDENCE, not for the purpose of weighing conflicting testimony to ascertain the preponderance, but merely to ascertain whether there was any evidence at all to sustain the decision of the inferior tribunal.

MUNICIPAL CORPORATIONS.—THE APPROVAL OF THE MAYOR is not necessary to a resolution of the common council preferring charges against an officer, where such council, by a vote of two-thirds of its members, is authorized to remove an officer for a sufficient cause after preferring charges and giving him a hearing.

PUBLIC OFFICERS.—A STATUTE AUTHORIZING THE REMOVAL OF AN OFFICER for sufficient cause means legal cause, and not any cause which the board authorized to make such removal may deem sufficient. It must be a cause relating to and affecting the administration of the office, and must be restricted to some thing of a substantial nature directly affecting the rights and interests of the public. It must be one attacking the qualifications of the officer, or his performance of his duties, and showing that he is not a fit and proper person to hold the office.

PUBLIC OFFICERS.—CHARGES AGAINST AN OFFICER IN PROCEEDINGS FOR HIS REMOVAL should specify the causes with such reasonable detail and precision as shall inform him what dereliction of duty is urged against him.

PUBLIC OFFICERS.—WHAT IS A SUFFICIENT CAUSE FOR THE REMOVAL OF AN OFFICER IS A QUESTION FOR THE COURTS.

PUBLIC OFFICERS.—REMOVAL OF—INSUFFICIENT CHARGE.—In proceedings to remove an officer for sufficient cause, general charges without any specification of facts are not sufficient to support an order of removal, as where the officer is charged with using his official position to gratify his personal feelings and prejudices, and acting without ability, impartiality, and sense of justice, and having no just appreciation of the responsibilities that should characterize the discharge of his official duties, and being incompetent and inefficient.

B. C. Rude and A. L. Thurman, for the relators.

J. D. Holmes, for the respondents.

241 MITCHELL, J. By the charter of the city of Duluth all powers and duties connected with, and incident to, the government and discipline of the fire department of the city are vested in three commissioners, called the "board of fire commissioners," who have entire control of the department, including the appointment and discharge of all employees connected with it, and making their own rules and regula-

tions for the government of the same. These commissioners are, "on nomination of the mayor," "appointed by the common council," and hold their office for the term of three years. The charter provides that:

"Any member of said board may at any time be removed by a vote of two-thirds of all the members elect of the common council of said city for sufficient cause, . . . provided that the said common council shall previously cause a copy of the charges preferred against such member sought to be removed, and notice of the time and place of hearing the same, to be served on him at least ten days previous to the day so assigned, and opportunity be given him to make his defense personally or by counsel."

²⁴² It is here sought, by *certiorari*, to review the proceedings of the common council in assuming to remove the relators from the office of fire commissioners.

1. It is urged by respondents that the power of removal from office conferred on the common council is purely administrative and *quasi* political, and therefore that their proceedings cannot be reviewed on *certiorari*.

That this power may not be "judicial" in the sense that it can only be conferred upon the courts, in whom all judicial power is vested under the constitution, has nothing to do with the question; for there is nothing now better settled than that *certiorari* will lie to review the *quasi* judicial acts and proceedings of municipal officers and bodies. Neither is there any thing better settled than that while the incumbent has no vested right of property, as against the state, in a public office, yet his right to it has always been recognized by the courts as a privilege entitled to the protection of the law, and that proceedings, in all cases where the amotion from office is for cause, upon notice and hearing, are adversary and judicial in their nature, and may be reviewed on *certiorari*. We think there is practically no conflict in the authorities on this point, the only difference among them being merely as to what they will review on such a writ. Some courts, restricting the writ to its original common-law office, hold that it brings up for review only the record, and not the evidence, and hence that they will not look into the evidence at all, but merely inspect the record, to see whether the inferior tribunal had jurisdiction, and had not exceeded it, and had proceeded according to law, or, as expressed in one case, whether the tribunal "had kept within its jurisdiction, or

whether the cause assigned was a cause for removal under the statute." Other courts hold that the evidence may be brought up, not for the purpose of weighing it, to ascertain the preponderance, but merely to ascertain whether there was any evidence at all to sustain the decision of the inferior tribunal—whether it furnished any legal and substantial basis for the decision. The latter is the doctrine of this court as to the office of the writ of *certiorari*. But, while this is so, we recognize the prime importance of each department of government avoiding any thing like improper interference ²⁴³ with the others in the discharge of their functions; also, that while city councils and other municipal bodies may not have the power to remove from office, except for cause, yet, this power being designed to insure efficiency and fidelity in the discharge of official duty, the degree of incompetency or inefficiency which amounts to sufficient cause for removal must of necessity, within certain established limits, rest somewhat in the sound discretion of the officer or body in whom the power of removal is vested. We also recognize the fact that while in the exercise of this power their proceedings are *quasi* judicial, and hence reviewable by the courts, yet they are not courts, but essentially legislative and administrative bodies; and that their action should be considered in view of their nature and the purposes for which they were organized, and not tested by the strict legal rules which prevail in trials in courts of law. Hence, if such a body has kept within its jurisdiction, and the evidence furnished any legal and substantial basis for their action, it ought not to be disturbed for any mere informalities or irregularities which might have amounted to reversible error in the proceedings of a court. To apply any other rule to the proceedings of such bodies would be impracticable, and disastrous in the extreme to public interests.

2. The first contention of relators is that the common council never acquired jurisdiction, because the notice of hearing and the copy of the charges were not served on them as required by the charter. The particular objection is that, when the service was made on them, the resolution of the common council preferring these charges against them had neither been approved by the mayor, nor passed over his veto, as required by the city charter: Special Laws 1887, c. 2, subc. 3, sec. 1. There is no merit in this point. Under the charter the power of removal from office is vested solely in the con-

mon council, and the mayor has no power over, or control of, their proceedings in presenting or investigating charges against a city official with a view to removal from office. Their action in preferring charges against relators was not such an ordinance or resolution as comes within the purview of subchapter 3, section 1, and did not require the approval of the mayor before it took effect.

244 3. The next question is whether the charges presented were sufficient in law to constitute a cause for removal—whether they were sufficient in form and substance to authorize the common council to proceed. "Cause," or "sufficient cause," means "legal cause," and not any cause which the council may think sufficient. The cause must be one which specially relates to and affects the administration of the office, and must be restricted to some thing of a substantial nature directly affecting the rights and interests of the public. The cause must be one touching the qualifications of the officer or his performance of its duties, showing that he is not a fit or proper person to hold the office. An attempt to remove an officer for any cause not affecting his competency or fitness would be an excess of power, and equivalent to an arbitrary removal. In the absence of any statutory specification the sufficiency of the cause should be determined with reference to the character of the office and the qualifications necessary to fill it: *Bagg's case*, 11 Coke, 93 b; *Rex v. Richardson*, 1 Burr. 517-540; *State v. Love*, 39 N. J. L. 14; *State v. McGarry*, 21 Wis. 496; *State v. Common Council*, 9 Wis. 254; *People v. Thompson*, 94 N. Y. 451.

While the charges need not be stated with the technical nicety or formal exactness required in pleadings in courts, yet they must be specifically stated with substantial certainty. The specifications of the alleged causes should be formulated with such reasonable detail and precision as shall inform the incumbent what dereliction of duty is urged against him. There should be a statement of charges, with a specification of facts, constituting a sufficient cause for removal, sufficiently distinct to apprise the officer of the grounds upon which the charges are based: *Andrews v. King*, 77 Me. 224; *People v. Thompson*, 94 N. Y. 451; *Dillon on Municipal Corporations*, sec. 255.

The sufficiency and reasonableness of the cause of removal are questions for the courts: *Dillon on Municipal Corporations*, sec. 252, and cases cited. This has been the settled

law ever since *Bagg's case*, 11 Coke, 93 b, and we are not aware of any respectable authority to the contrary. Of course, cases (many of which are cited by respondents) where an officer or body was vested with an absolute power of removal at discretion are not in point.

²⁴⁵ Upon examination of the charges in this case we are clearly of opinion that they are not sufficient in law. Considering them as a whole they show on their face that they were not formulated in a very judicial frame of mind. They read more like a heated hostile declamation than a calm and deliberate statement of charges with a view to a fair investigation. Many of them are mere glittering generalities, without any statement or specification of facts, such as, for example, "using their official positions to gratify their personal feelings and prejudices"; "that neither ability, impartiality, nor sense of justice characterizes their management of one of the most important branches of the city government"; "that the gratification of their personal spites and prejudices is the paramount motive often actuating and controlling them in the supposed discharge of their duties"; "that they have no just appreciation of the responsibilities that should characterize the discharge of the duties of the important office of fire commissioner," etc. It hardly need be said that such general accusations as these are entirely lacking in any specification of facts to apprise any one of the grounds of the charges which he is called on to meet.

Some of the charges, such as that "the reasonable recommendations and requests of the common council are treated with the utmost contempt" have no relation whatever to the administration of the office of fire commissioner, and remind us of some of the charges in *Bagg's case*, 11 Coke, 93 b.

The first part of the fifth charge, viz., failure to make monthly reports to the common council, as required by the charter, was virtually abandoned, no attempt having been made to substantiate it, and hence may be left out of account altogether. The only charges that even attempt to state any specific cause for removal are the fourth and the last part of the fifth. Indeed, these are the only ones which counsel for respondents seriously attempts to support. The fourth relates to the discharge of officers of the fire department without cause, or from improper motives, but is entirely lacking in specifications of either dates or names.

As the board of fire commissioners has, under the charter, absolute power to discharge any of the employees or officers of the department, at their discretion, and may, in the performance of their duties, have had occasion to exercise this power frequently, so ²⁴⁶ general and indefinite a statement is not sufficient to advise them what particular acts are the basis of the charge. The last part of the fifth charge, accusing the relators generally of being "incompetent" and "inefficient," without specifying wherein or in what respect, is also entirely too vague and general. We agree with counsel that "incompetency" and "inefficiency" in the discharge of official duty may be good grounds for removal, and that it may not be necessary to specify in detail particular acts or facts. But these words are so general that they may mean any thing or every thing which might constitute good cause for removal. For example, incompetency might result from physical disability, from mental disability, or from lack of integrity, etc. So, inefficiency might consist of habitual neglect of duty, incapacity to preserve discipline, or of a variety of things. Hence, while it is not required to go into details, yet the charges ought, at least, to advise the officer in what respect he is claimed to be incompetent or inefficient. Our conclusion is, that none of the charges relied on are sufficient in law.

This renders it unnecessary to consider the evidence at all. We may say, however, that a perusal of it impresses us with the feeling that it furnished no reasonable basis for the action of the council in removing the relators from office. It is perfectly apparent that this whole trouble grew out of a foolish quarrel between the common council and the board of fire commissioners over the suspension by the latter of a fireman by the name of Twaddle.

The proceedings of the common council in the matter are quashed.

VANDEBURGH, J., absent, took no part.

CERTIORARI—REMOVAL OF OFFICER BY CITY COUNCIL—REVIEW OF PROCEEDINGS.—Where a person in possession of the office of city alderman seeks to review proceedings taken by the board of aldermen which disturbs him in the enjoyment of his office his remedy is by *certiorari*: *Board of Aldermen v. Darrow*, 13 Col. 460; 16 Am. St. Rep. 215, and note. A writ of *certiorari* is not the appropriate remedy for testing the legality of a mere appointment to a public office: *Simon v. Mayor*, 52 N. J. L. 367. See the extended notes to *Mayor v. Morgan*, 18 Am. Dec. 237, and *Duggen v. McGruder*, 12 Am. Dec. 532.

CERTIORARI—REVIEW OF EVIDENCE.—*Certiorari* lies to inquire whether any evidence has been adduced to show some essential fact, but not to review findings of fact when some competent evidence as to them has been adduced: *Keenan v. Goodwin*, 17 R. I. 649. Where the evidence set out in the return is insufficient to justify the conviction or other judicial act complained of it will be quashed on *certiorari*: *Jackson v. People*, 9 Mich. 111; 77 Am. Dec. 491.

OFFICERS—REMOVAL—GROUNDS FOR.—An officer can be removed only for misconduct in the management of the office from which his removal is sought, and such misconduct must constitute a legal cause for his removal, and must affect the proper administration of the office: *Speed v. Common Council*, 98 Mich. 360; *ante*, p. 555, and note.

OFFICERS.—REMOVAL OF PERSONS FROM THEIR OFFICES FOR CAUSE involves the exercise of judicial power: *People v. Stuart*, 74 Mich. 411; 16 Am. St. Rep. 644, and note; *Board of Commissioners v. Johnson*, 124 Ind. 145; 19 Am. St. Rep. 88, and note; *State v. Harrison*, 113 Ind. 234; 3 Am. St. Rep. 663.

OFFICERS—REMOVAL—NOTICE.—Where an officer is appointed for a fixed term, and the power of removal is not expressly declared by law to be discretionary, he cannot be removed except for cause, and when cause must be assigned for his removal he is entitled to notice and a chance to defend: *Hallgren v. Campbell*, 82 Mich. 255; 21 Am. St. Rep. 557.

O'CONNOR v. DELANEY.

[53 MINNESOTA, 247.]

COTENANT'S LIABILITY FOR RENT.—IF A COTENANT LEASES THE COMMON PROPERTY at an agreed rent, and remains in exclusive possession thereof after the term for which his cotenant's share was let to him, he will be held to be in in his character as a tenant, and therefore to be liable for rent.

ACTION for an accounting and settlement of partnership affairs. The plaintiff and defendant, in June, 1885, dissolved a partnership theretofore existing between them, and agreed that defendant should have exclusive use of the property for the first year after that time, paying for plaintiff's share thereof interest at eight per cent per annum on a mortgage for two thousand dollars. About five years afterwards this suit was brought. Plaintiff asked to be allowed rent upon his share of the property for the whole period of its occupancy by the defendant, while the latter contended that he was liable only for the single year after the leasing. The trial court sustained plaintiff's views, and the defendant appealed.

A. E. Hawes and O. H. Comfort, for the appellant.

J. F. Fitzpatrick, for the respondent.

²⁴⁸ GILFILLAN, C. J. Except in regard to the claim of respondent for rent of his interest in the real estate, the joint property of the parties, there is no question but of the sufficiency of the evidence to sustain the findings of fact, and we think it sufficient.

It is also sufficient to sustain the finding of fact on the claim for rent. But it is objected that the complaint for the rent alleges that appellant was to pay the value of the use of the property, while the finding, not following the pleading, is that it was agreed appellant should pay for the first year an amount equal to the interest on a certain mortgage, to wit, one hundred and sixty dollars, and that appellant held over and continued in possession after the first year. On the trial no objection was made to the evidence as to the amount agreed on for rent, nor any question raised of variance between the pleading and the proofs, and we must hold the objection to have been waived.

It is objected that, according to the evidence, the defendant agreed to pay the one hundred and sixty dollars interest on the mortgage to the mortgagee, and he did so, and so plaintiff cannot recover it. Of course, it was intended plaintiff should have the benefit of such payment, and, as the amount so paid was credited to the defendant in the partnership account, it was proper for the court, in adjusting in one judgment all matters between the parties (including partnership matters), to credit the amount to plaintiff, otherwise the payment would be no benefit to him. One credit offsets the other, and it stands now as though neither party had been credited with it.

Where there is no agreement between the parties, and one cotenant is not excluded by the other from enjoyment of the common property, neither can recover from the other for the use, rents, and profits of the estate. But, by agreement, one may become tenant of the other of his part of the estate; and when the relation of landlord and tenant is thus created we think the tenant co-owner, if he ²⁴⁹ remain in exclusive possession after the term for which his cotenant's share was let to him, will be held to do so in his character of tenant, and the same rules will apply as in case of any other tenant holding over. It was therefore correct to charge the defendant, during the time of his so holding over, at the rate of rent agreed on for the term.

Order and judgment affirmed.

VANDEBURGH, J., took no part in this decision.

COTENANCY—USE AND OCCUPATION BY COTENANT—LIABILITY FOR RENTS. A tenant in common who occupies and uses the whole of the common property himself is liable to his cotenants for a reasonable rent therefor in the condition in which it was when he took possession: *Early v. Friend*, 16 Gratt. 21; 78 Am. Dec. 649, and extended note; *Hancock v. Day*, 1 McMull. Eq. 69; 36 Am. Dec. 293, and note; *Annely v. De Saussure*, 26 S. C. 497; 4 Am. St. Rep. 725, and note; *West v. Weyer*, 46 Ohio St. 66; 15 Am. St. Rep. 552, and note. See *Graham v. Pierce*, 19 Gratt. 28; 100 Am. Dec. 658, and note. In the following line of cases the general rule is held to be that one cotenant is not liable to account to the others for rents during his use and occupation of the land, unless there was an agreement to pay, or his entry and possession were hostile and exclusive: *West v. West*, 90 Ala. 458; *Davis v. Hutton*, 127 Ind. 482; *Thompson v. Jones*, 77 Tex. 626; *Belknap v. Belknap*, 77 Iowa, 71. The use or occupation of common property by one tenant in common does not create the relation of landlord and tenant, nor render him liable for rent: *Hamby v. Wall*, 48 Ark. 135; 3 Am. St. Rep. 218, and note; *Pico v. Columbel*, 12 Cal. 414; 73 Am. Dec. 550, and note.

BROWN v. WINONA AND SOUTHWESTERN RY. CO.

[58 MINNESOTA, 259.]

SURFACE WATERS.—IF AN OWNER IMPROVES HIS LAND for the purpose for which it is ordinarily used, doing only what is necessary for that purpose, and being guilty of no negligence in the manner of doing it, he is not liable because, as an incident of so improving, the surface waters accumulate, and flow in a stream upon the land of another.

Thomas Simpson and Henry M. Lamberton, for the appellant.

Keyes and Brown, for the respondent.

261 GILFILLAN, C. J. The defendant constructed its road, running from east to west, across block 2, in the village of Utica, in this state. For the purpose of laying its track it raised an embankment across the block, taking the earth from along each side, thus making on each side what is called a "borrow-pit." The two pits were connected by a culvert through the embankment. On the north side the surface of the ground slopes for a considerable distance towards this part of the embankment from the north and north-east and northwest, so that the surface waters from rains and melting snows flow towards that part of the embankment, and, before it was there, flowed over the lands to the south and east. The effect of the embankment was to stop the flow of surface water in a diffused manner over the surface of the ground to the south; to gather it into the

north borrow-pit, from which it flowed through the culvert to that on the south side, and from that, at its lower or easterly end, it flowed in a stream upon plaintiff's lot in the same block. It is to be assumed, for the purpose of the point involved, that the presence of the embankment, culvert, and borrow-pits was the cause of the water flowing in a stream on plaintiff's land, and that no such quantity of surface water would have reached his land but for their existence.

No question is made of the defendant's right to make the embankment, culvert, and borrow-pits, nor is it claimed that they were not necessary to the construction of the railroad in the usual ²⁶² way of constructing railroads over similar ground, nor is any negligence in the manner of doing the work seriously claimed.

The case was, in effect, left to the jury, upon the proposition (upon which respondent's counsel squarely present their case here) that if the embankment, culvert, and borrow-pits, though carefully made, and necessary to the construction and operation of the road, caused the surface waters to accumulate and flow in a stream, as they would not have done had not the natural surface of the ground been disturbed, upon plaintiff's land, doing damage, the defendant is liable.

The question of the rights of landowners in respect to surface waters has, in one form or another, been many times before this court. From the memorandum of the learned judge who tried the cause it is apparent that he misapprehended to some extent the decisions of this court on the subject. We are not surprised that he did so, for in some of the opinions are expressions which, disconnected from the facts of the cases in which they were written, would point to the conclusion at which he arrived. This makes it proper to analyze most of those decisions.

The civil-law doctrine of servitudes in respect to surface waters has never been admitted in this state. Nor has the common-law rule been admitted, in the rigorous form in which it has been expressed by some text-writers and decisions. Surface water has been styled a common enemy, which every landowner may get rid of as best he can, and every owner must guard against as best he may. We have held that each owner's absolute liberty, in respect to such waters, must be modified by the maxim that each must so enjoy his own as not unnecessarily to injure another's.

In *O'Brien v. St. Paul*, 25 Minn. 331, 33 Am. Rep. 470, an attempt was made to state the rule on the subject thus: "An owner may improve his land for the purpose for which such land is ordinarily used, and may do what is necessary for that purpose. He may build upon it, or raise or lower its surface, even though the effect may be to prevent surface water, which before flowed upon it, from coming upon it, or to draw from adjoining land surface water which would otherwise remain there, or to shed surface water over land on which it would not otherwise go." Any more restricted rule ²⁶³ than this would be likely to seriously interfere with the proper improvement and enjoyment of lands. Every landowner must hold his own land subject, so far as surface waters are concerned, to whatever effect on his land the proper improvement and enjoyment of their land by his neighbors may have. In that case the court declined to decide whether in any case an owner can lawfully improve his own land in such a way as to cause the surface water to flow off in streams on the land of another, but it did decide that he may not do so unless it be necessary to the proper improvement and enjoyment of his own land, and, because the defendant had done so without such necessity, it held the plaintiff entitled to recover. *Jordan v. St. Paul etc. Ry. Co.*, 42 Minn. 172, is the only case in which the facts presented, so that it had to be decided, the question which the court declined to decide in *O'Brien v. St. Paul*, 25 Minn. 331, 33 Am. Rep. 470. It was a case where, as an incident or necessary consequence of properly constructing the defendant's railroad, the surface waters were collected in a ditch, and flowed in streams, in increased and injurious quantities, on plaintiff's land. The court held it came within the rule stated in *O'Brien v. St. Paul*, 25 Minn. 331, 33 Am. Rep. 470, and that plaintiff could not recover. In *Hogenson v. St. Paul etc. Ry. Co.*, 31 Minn. 224, the only attempt by defendant to improve its own land was by collecting the surface waters naturally resting on it, and, by means of ditches, conducting them to, and depositing them on, the land of the plaintiff. It was held plaintiff could recover. The court referred to the rule in the *O'Brien* case, but held that one may not improve his own land by merely transferring to the land of another a burden which nature has imposed on his own. In reference to that decision the court, in *Jordan v. St. Paul etc. Ry. Co.*, 42 Minn. 172, said: "It is only where such shifting of the burden follows as an

incident to using or improving his land, as such land is ordinarily used or improved, that it can be justified." *Township of Blakely v. Devine*, 36 Minn. 53, was a case where the town authorities, for the purpose of relieving a highway from surface waters collecting on it, made ditches to conduct such waters to, and discharge them on, the land of the defendant, and he had constructed an embankment to prevent the waters flowing ²⁶⁴ on his land. The action was to restrain him from so preventing them. No question of liability of the town was in the case. The court stated the question as follows: "The material question would seem to be the right of the defendant to protect his land from the overflow of the surface water collected in the highway, chiefly as the result of heavy rains." The town authorities were really endeavoring, in the action, to impose a servitude on the defendant's land, and maintain it as dumping-ground for waters collecting on the highway, and the court held they could not do this. In *Pye v. City of Mankato*, 36 Minn. 373, 1 Am. St. Rep. 671, the defendant, in improving a street, had constructed a gutter to collect and convey to the river surface water which had previously, following a natural depression in the ground, flowed across the street, which gutter was "negligently and wrongfully constructed, wholly insufficient in capacity to contain and carry off the water, and as a consequence it overflowed, and was cast in large and injurious quantities upon the land of plaintiff." The negligent and wrongful constructing of the gutter could not be deemed doing what was necessary to the proper improvement of the street. The opinion states five propositions as to the liability of a municipal corporation in respect to surface waters in grading its streets. The fifth is as follows: "But a city will be liable if it collects and gathers surface water by artificial means, such as sewers and drains, and casts it upon the premises of another in increased and injurious quantities. Such an act amounts to a positive trespass." As applied to, and explained by, the facts of the case then in hand the proposition was correct, though as a general rule applicable to a landowner in improving his land for the purposes for which such land is ordinarily used it may be criticised as not sufficiently guarded and qualified. The proper qualification of it is given at the end of the opinion, in stating the reason for the defendant's liability, thus: "Having intercepted the natural flow of this water, undertaken to gather up and conduct it in another direction by an

artificial channel, it was incumbent on the city to use reasonable care to do this in such a way as not to cause a positive trespass upon the lands of others. To fail to do this is negligence. Such was the fact in this case, and this brings it within the cases last cited." As ²⁶⁵ thus qualified the proposition is within the rule in the O'Brien case, for that rule does not admit of a landowner causing damage to the land of others by the negligent manner in which he improves his own land. *Rowe v. St. Paul etc. Ry. Co.*, 41 Minn. 384, 16 Am. St. Rep. 706, was a case of obstructing and setting surface waters back upon plaintiff's land. The only point decided was that a landowner, in improving his own land, is not obliged to provide for the passage of such waters as previously flowed from other land upon and over his own. Though there were no facts in the case calling for it, the opinion says, speaking of an owner's rights with respect to surface water, "he is not permitted to collect in a stream or body, and turn it upon the lands of others, to their injury"; citing *Hogenson v. St. Paul etc. Ry. Co.*, 31 Minn. 224, and *Township of Blakely v. Devine*, 36 Minn. 53. *Follmann v. City of Mankato*, 45 Minn. 457, was, like that of *Pye v. City of Mankato*, 36 Minn. 373, 1 Am. St. Rep. 671, a case of negligence. The opinion in one place says: "If the result of improvements actually made is to collect such water in a stream, and turn it thereon [on the land of another], to the damage of the owner, an action will lie." This expresses more nearly than language found in any other opinion of this court the proposition decided by the court below in this case. But it was not necessary to the decision of the case, for later in the opinion the court, after referring to certain acts of negligence on the part of defendant, says: "And in respect to the particular injury complained of the evidence is sufficient to show that it was due to an invasion of surface water, traceable to the acts and negligence above specified." The opinion in *Beach v. Gaylord*, 43 Minn. 476, contains a similar unguarded statement, though that was a case where the injury did not follow as a necessary incident to the owner's proper improvement of his land. The action was for damage to plaintiff's premises by defendant gathering the rainwater falling upon the roof of his house into a gutter, in which it flowed to a pipe, which discharged it—of course, in a stream—upon the ground so near plaintiff's line that it flowed in an increased quantity at that point upon her

lot, doing damage. It was found as a fact by the court below that there was no apparent necessity for so doing, in the ³⁰⁸ proper improvement and enjoyment of defendant's own land, so that the case was really like that upon which the court held the defendant liable in *O'Brien v. St. Paul*, 25 Minn. 331; 33 Am. Rep. 470.

From this review of the cases it is apparent that *Jordan v. St. Paul etc. Ry. Co.*, 42 Minn. 172, is the only one before this court in which was distinctly presented for decision the point involved in the proposition upon which the trial court left this case to the jury. For the sake of precision we will restate the question: When an owner improves his land for the purpose for which such land is ordinarily used, doing only what is necessary for that purpose, and being guilty of no negligence in the manner of doing it, is he liable because, as an incident of so improving, surface waters accumulate and flow in a stream upon the lands of others? A doubt upon this was suggested in the *O'Brien* case. But on more mature consideration we are of opinion that the owner so improving is not liable. The rule stated in that case has frequently been quoted in other cases in this court, and its correctness has never been questioned; and, but for the doubt suggested in that case, we do not think it would have been questioned that a case like this comes within it. One's land may be incidentally, even seriously, injured in value and usefulness by the proper improvement of adjacent land, withdrawing from it surface waters, the presence of which may improve its fertility and value, or shedding upon it surface waters which would not otherwise go there, and drowning it, or otherwise impairing its value, or causing such waters to remain upon it, although their presence may render it comparatively valueless, and no action will lie. When the injury is incidental to the proper improvement of adjacent land it is impossible to see that the manner in which such improvement operates to cause the injury—whether by drawing off the waters, or setting them back so that they cannot flow off, or causing them to run either in a diffused manner or in streams—can make any difference with the liability. If a man's land be injured to the extent of five hundred dollars by surface water coming upon it it would seem illogical and unreasonable that he may recover if it comes in streams but cannot recover if it come in a diffused manner. The test of liability must be, is the injury incidental to another man

doing on his own land what he has a right to do, i. e., improve it for ²⁶⁷ the purpose for which such land is ordinarily used, doing what is necessary for that purpose? It must, however, be understood that one cannot improve his own land by merely transferring waters which would naturally rest upon it to the land of another.

Order reversed.

VANDEBURGH, J., took no part in this decision.

SURFACE WATERS—LIABILITY FOR TURNING ON LAND OF ADJACENT PROPRIETOR.—One proprietor may turn and divert surface waters from his land onto the lands of another, without liability for so doing: *Johnson v. Chicago etc. R. R. Co.*, 80 Wis. 641; 27 Am. St. Rep. 76, and note. An upper owner may, by means of artificial drains, collect surface water upon his land and discharge it upon the land of the lower owner at a single point which is the natural watershed of both tracts, and at which there is a ditch on the lower land, although a larger quantity of water is thus discharged at that point than would naturally flow there by surface drainage, provided that in so doing care is taken not to cause unnecessary injury to the owner of the lower land: *Meixell v. Morgan*, 149 Pa. St. 415; 34 Am. St. Rep. 614, and note with the cases collected. But see *Patoka Township v. Hopkins*, 131 Ind. 142; 31 Am. St. Rep. 417, and note.

COOLEY v. MINNESOTA TRANSFER RAILWAY CO.

[53 MINNESOTA, 327.]

- A GARNISHMENT OF A WAREHOUSEMAN HAVING PERSONAL PROPERTY OF THE DEFENDANT IN HIS POSSESSION** charges such warehouseman with the responsibility of retaining the property as in custody of the law, in order that it may be applied to the satisfaction of the debt on which the garnishment was placed, and therefore excuses the delivery of such property to the owner whose interest therein has been garnished.
- A PLEDGE REMAINS VALID THOUGH THE PLEDGED PROPERTY IS GIVEN INTO THE POSSESSION OF ANOTHER HAVING NO KNOWLEDGE OF SUCH PLEDGE**, in whose name it is shipped, directed to the pledgors as assignees, if an agent of the pledgee remained in charge of the property during its transportation, and it was never in fact restored to the possession of the pledgors.
- PLEDGE AND GARNISHMENT.**—If a pledge is effected it is not necessary that a creditor be given notice thereof, and his levy of a garnishment before he has such notice cannot give him a lien paramount to the rights of the pledgee.
- A PLEDGE IS NOT TERMINATED BY A SALE OF THE PLEDGED PROPERTY TO THE PLEDGEE** so that a garnishment levied after the pledge, and before the sale, takes precedence over the rights of the pledgee under the pledge.
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A. D. Polk and Henry C. James, for the appellant.

John C. Bullitt, Jr., for the defendant railway.

Moritz Heim and John D. O'Brien, for the intervenor.

330 DICKINSON, J. This was an action of replevin to recover forty-three horses and mules which, in the course of transportation by rail from Deadwood, Dakota, to St. Paul, had been delivered to the defendant, the transfer railway company, and unloaded, and left in its yards. The possession of the property by the railway company was rightful, at least until it refused to deliver it to the plaintiff, upon his demand, on the fourteenth day of April, 1891. The property had been owned by Cable and Chute prior to March 20th of that year. The plaintiff's asserted right to recover it rests upon the alleged fact that at the latter date, at Deadwood, Cable and Chute **331** had delivered it to the plaintiff in pledge, to secure him for certain indebtedness and liability incurred in their behalf, it being agreed that the plaintiff should take the property to St. Paul, and dispose of it for his reimbursement.

The railway company asserts a lien upon, and right to retain possession of, the property, on account of its charges for feeding and caring for the same (amounting to four hundred and eighty-nine dollars) from the time when it was received by it, April 8th, until it was taken by the plaintiff in this action of replevin, on the fifteenth day of May.

While the railway company was so holding the property, and before the plaintiff demanded that it be surrendered to him, William Hogan had commenced an action on contract against Cable and Chute for the recovery of fifteen hundred dollars and interest, and had caused process of garnishment to be served upon the railway company on account of its holding this property, which Hogan claimed to belong to Cable and Chute. During the pendency of this action of replevin Hogan was allowed, upon his motion, to intervene, as a party therein, without objection, so far as appears. He had then recovered judgment in his action against Cable and Chute. His contention in this action is that the property belonged to Cable and Chute, and that he secured a lien thereon by virtue of the garnishee proceedings, and that as to him the alleged pledge to the plaintiff was invalid, if any such pledge was made.

The plaintiff, having taken the property by virtue of the process in this action, sold the same.

The court, deciding the case without a jury, found that Cable and Chute "pretended or attempted" to pledge the property to the plaintiff, but that this was void as to creditors, and as to the defendant, and that, as to the intervenor (Hogan) Cable and Chute remained the absolute owners. Judgment was allowed in favor of the railway company, against the plaintiff, for the recovery of the amount of its charges for keeping, four hundred and eighty-nine dollars, and in favor of the intervenor, Hogan, and against the plaintiff, for the recovery of the amount of his (Hogan's) judgment against Cable and Chute. This appeal by the plaintiff is from an order refusing a new trial.

A chattel mortgage had been given by Cable and Chute to the plaintiff, covering some, but not all, of the property here involved, long before the alleged pledge. We deem this of little importance, ³³² for, if we could ascertain from the case what part of this property was included in the mortgage, it does not appear what was the value of the same. The plaintiff's case really rests upon the pledge, rather than upon the prior mortgage.

The case, as between the plaintiff and the railway company, seems plain, irrespective of the question as to the sufficiency and effect of the pledge. When the plaintiff demanded possession of the property, there having been a delay of several days on account of some unadjusted claim of charges for transportation, the defendant was not holding the property in the relation of a carrier, but as a warehouseman, and such had been the case for some six days; and in the mean time, and just before such demand, the garnishment had been made in behalf of Hogan. The garnishment legally charged the company with the responsibility of retaining the property, as in the custody of the law, in order that it might be applied to the satisfaction of Hogan's debt, if he should succeed in maintaining his claim. It excused the company from delivering the property to the plaintiff: *Drake on Attachments*, 453; *Stiles v. Davis*, 1 Black, 101. Whether goods in the possession of a common carrier, and while actually in transit, may be the subject of garnishment, we do not consider. We do not construe the finding of the court to be that the defendant retained the property as a common carrier.

The defendant company had a lien upon the property for its proper charges for keeping it; and the determination of the court, awarding a recovery therefor against the plaintiff,

who had replevied and sold it, was justified by the evidence, and was in accordance with the law. Whether the pledge was complete and effectual, or not, the result, in this particular would be the same.

Different questions are presented, as between the plaintiff and the intervenor. As between them, the question is one of priority of rights. If the pledge to the plaintiff was complete and effectual, and was still in force at the time of the garnishment by Hogan, any rights which the latter might acquire by the garnishment would be subordinate to those of the plaintiff as pledgee.

It does not appear on what ground, or for what reason, the court found the pledge to have been void as to Hogan, a creditor of Cable and Chute. If it was because the evidence was deemed insufficient to establish the fact of the pledge having been made at Deadwood, ³³³ we should be compelled to say that the court had failed to fully appreciate the force of the evidence; for, as we read it, it is all one way, and was of such a nature as to forbid any other conclusion than that the property was, by Cable and Chute, actually and completely delivered to, and taken possession of, by the plaintiff, to be by the latter retained and disposed of for his reimbursement. It may be supposed, however, that the court considered that the circumstances connected with its transportation to St. Paul avoided or terminated the pledge, or precluded the plaintiff from asserting his rights as a pledgee, as against Hogan. These circumstances were as follows:

Cable and Chute had taken the property to Deadwood pursuant to some agreement with Streeter & Co., who had some contract or work of railroad construction there. Cable and Chute had a subcontract under Streeter & Co., and their agreement with Streeter & Co. involved an undertaking on the part of the latter to furnish transportation for this property to Deadwood and back to St. Paul. Cable and Chute had completed their contract, so that they were entitled to call upon Streeter & Co. to have the property returned to St. Paul without expense to them. When the property was pledged to the plaintiff, his agent, who had it in his possession, arranged with Cable and Chute to conceal this fact from Streeter & Co., lest the latter should refuse to abide by their agreement to have it transported back to St. Paul. Hence the shipment was made in the name of Streeter & Co., and

Cable and Chute were named as consignees; and Streeter & Co. arranged the matter of transportation so that no charge was made therefor to the plaintiff, nor to Cable and Chute.

This did not avoid or terminate the pledge. The plaintiff employed an agent who remained in charge of the property during its transportation to St. Paul. The possession was never, in fact, restored to Cable and Chute, nor do they appear to have ever claimed to be in possession after they delivered the property to the plaintiff. As between those parties, it is certain that the pledge remained effectual. Even if, after the property had been delivered in pledge to the plaintiff, the latter had intrusted it again to the pledgors as his agents or bailees for the special purpose of taking it to St. Paul in his behalf, to be there again restored to him, we ³³⁴ suppose that the pledge would remain good. The possession of the original pledgors, as the agents of the pledgee, would be his possession: *Casey v. Cavaroc*, 96 U. S. 467. But, however that may be, this case is stronger for the plaintiff than that just supposed, for the property was not, in fact, redelivered to the pledgors, but remained, uninterruptedly, in the custody of the plaintiff's agent.

The fact that the plaintiff, for the purpose above stated, employed the names of Cable and Chute as consignees, so that it might appear that the property was shipped for them, did not, as we have said, divest the plaintiff of his pledge. Neither did it subordinate the plaintiff's rights, as pledgee, to the subsequent claim of Hogan under the garnishment, or estop the former from claiming the preference which his pledge secured to him. There is no registry law relating to the pledging of property. If the pledge was effectual it is not material whether Hogan had notice of it or not. His debt was not created in reliance upon any appearance of continued possession, or of absolute title, in Cable and Chute, by reason of their being named as consignees. It long antedated the transactions here in question. Nor, even if the concealment of the pledge from Streeter & Co., for the purpose stated, was a fraud upon the latter it would not affect the case of Hogan. It did not concern him in any way. But it is not even apparent that the concealment was a fraud upon Streeter & Co. Their agreement to secure free transportation back to St. Paul was not discharged by the pledging of the property to the plaintiff. In brief, the pledge to the plaintiff was valid, and

was prior and superior to any rights acquired by the subsequent garnishment, and there is nothing in the case to estop him from asserting his superior right.

A considerable time after the garnishment, while the plaintiff still held the property, it seems that Cable and Chute sold the same to him for a specified price, which he was to apply as payment on the indebtedness to him. It is contended that thereby the plaintiff waived and lost his rights as pledgee, so that, by reason of the garnishment, the intervenor's rights were superior to any remaining in the plaintiff. We cannot so hold. The transfer of the legal title, for a specified price, to be applied on the debt, was not inconsistent with, and did not divest the plaintiff of, the essential ³³⁵ rights which he already had under the pledge; that is, the possession of the property, and the right to dispose of it for the satisfaction of his debt. That right still remained, as against creditors of the pledgor who might have secured attachments subsequent to the pledge. It may be that the added interest which the sale conferred—the legal title—was held subject to the intervening garnishment, and that the plaintiff might be accountable to the intervenor for the value of the property in excess of the debt, if there was any such excess. But the case does not present that question.

It is unnecessary to consider whether the claim of the intervenor was a proper subject of litigation in this action.

As between the plaintiff and the defendant railway company the order is affirmed. As between the plaintiff and the intervenor it is reversed.

VANDEBURGH, J., did not take part in this decision.

ATTACHMENT OF PROPERTY IN THE HANDS OF A WAREHOUSEMAN.—A warehouseman, who has given a receipt which entitles the holder to the goods stored upon presentation thereof, is liable to an attaching creditor of the bailor, if he surrenders the goods to a holder of such receipt, who purchased the same after the date of the attachment: *Smith v. Picket*, 7 Ga. 104; 50 Am. Dec. 385.

PLEDGE—POSSESSION OF PLEDGED ARTICLE BY THIRD PERSON.—A pledge is not impaired when the possession of the thing has been passed to the pledgee, and has not been parted with, except to a third person agreed on by the parties: *Peters v. Pacific Guano Co.*, 42 La. Ann. 690. It is sufficient to the existence of a symbolical possession by the pledgee that the property is in the possession of some person or corporation other than the pledgor: *Union Trust Co. v. Trumbull*, 137 Ill. 146. See the extended note to *Lockett v. Townsend*, 49 Am. Dec. 732.

PLEDGE—PURCHASE BY PLEDGEE.—A pledgor may lawfully stipulate that the pledgee may purchase, and this may be done at the time of making the pledge: *Appleton v. Turnbull*, 84 Me. 72. See the extended notes to *Griggs v. Day*, 32 Am. St. Rep. 731, and *Robinson v. Hurley*, 79 Am. Dec. 502; also the case of *Hill v. Finigan*, 77 Cal. 267; 11 Am. St. Rep. 279, and note.

O'NEILL v. JOHNSON.

[58 MINNESOTA, 439.]

FOR THE MALICIOUS PROSECUTION OF A CIVIL ACTION without probable cause an action will lie.

PLEADING.—IN AN ACTION FOR MALICIOUS PROSECUTION MALICE IS A FACT TO BE PLEADED as such, and it would be bad pleading to set forth the evidence to establish it.

MALICIOUS PROSECUTION—PLEADING.—A COMPLAINT AVERRING that the defendant instituted a civil action against plaintiff maliciously and without probable cause, and that plaintiff was indebted to the defendant in no sum, and liable to her in no manner whatever, which defendant well knew, and that plaintiff necessarily lost time and performed work in defending the action, and employed and was compelled to pay attorneys in such defense, states a cause of action.

DAMAGES, REMOTE FOR MALICIOUS PROSECUTION.—An allegation that by reason of a garnishment in an action of a sum due the defendant therein, which sum was not paid to him, and he was unable to pay his rent and his employees, and his lease was canceled by his landlord, and his employees left his service, and his business was thereby ruined and his prospects blighted, discloses damages too remote for allowance in an action for the malicious prosecution of the former suit.

J. M. Burlingame, for the appellant.

McHale and Abell, for the respondent.

441 GILFILLAN, C. J. The court below, in ordering judgment for defendant on the pleadings, undoubtedly did so because it considered the complaint does not state a cause of action. The statement of damage recoverable in such an action is so obscured by statements in regard to damages not recoverable, because too remote and speculative, that we suspect the court overlooked the former, its attention being wholly directed to the latter.

An action will lie for maliciously and without probable cause prosecuting a civil action, whereby damage is caused to the defendant in such action: *McPherson v. Runyon*, 41 Minn. 524; 16 Am. St. Rep. 727; *Burton v. St. Paul etc. Ry. Co.*, 33 Minn. 189; *Rachelman v. Skinner*, 46 Minn. 196.

442 In an action for malicious prosecution, malice is a fact to be pleaded as such, and it would be bad pleading to set

forth the evidence to establish it. Want of probable cause, though made up of a question of fact and a question of law, is, like many other composite facts—such, for instance, as title to property—a fact for the purpose of pleading, and may be stated directly.

In this complaint it is alleged that the action by defendant against plaintiff was instituted maliciously and without probable cause, and it is further alleged “that this plaintiff was indebted to the defendant in no sum, and liable to her in no manner whatever, which defendant well knew,” from which facts, as matter of law, there was no probable cause. The termination of that action is alleged, and also that plaintiff necessarily lost time and performed work in and about the defending said action in the sum of ten dollars, and employed attorneys, and was compelled to pay, and did pay, them five dollars for their services in the defense of the action. These were direct and proximate damages from the malicious bringing of the action, and are recoverable.

The complaint, therefore, states a cause of action.

But the damages predicated on the allegations that by reason of the garnishment in the action the fifty-four dollars was not paid to plaintiff's firm, and because it was not paid they were unable to pay their rent and employees in their business, and because they were unable to pay their rent and employees their landlord became dissatisfied, and terminated and canceled their lease, and their employees became dissatisfied, and refused to work for them, and, as a consequence, their business was ruined and their prospects blighted are too remote and speculative. There is too much room for contingencies and intervening causes between the garnishment of the fifty-four dollars and the alleged injury to the firm's business and prospects to permit of the latter being considered as the natural and proximate result of the former. Whether it was the result of the former at all must necessarily be arrived at by conjecture and speculation: *Cushing v. Seymour*, 30 Minn. 301; *Simmer v. City of St. Paul*, 23 Minn. 408; *Swinfin v. Lowry*, 37 Minn. 345; *Carsten v. Northern Pac. R. R. Co.*, 44 Minn. 454; 20 Am. St. Rep. 589.

⁴⁴³ In *Goebel v. Hough*, 26 Minn. 252, the injury to the business was the direct, immediate result of the wrongful act.

Judgment reversed.

VANDEBURGH, J., absent.

MALICIOUS PROSECUTION OF CIVIL SUIT—WHETHER ACTIONABLE.—An action for damages may be maintained for the malicious prosecution of a civil action without probable cause, to the injury of the defendant: *McPherson v. Runyon*, 41 Minn. 524; 16 Am. St. Rep. 727, and note; *Antcliff v. June*, 81 Mich. 477; 21 Am. St. Rep. 533, and note; *Brooks v. Sanger*, 69 Tex. 24. A civil suit, no matter how malicious or unfounded, cannot be made the ground for an action for malicious prosecution and the recovery of damages unless there has been an actual interference with either a person or his property: *Norcross v. Otis*, 152 Pa. St. 481; 34 Am. St. Rep. 669, and note. See, also, the extended notes to *McCardle v. McGinley*, 44 Am. Rep. 346-348; *Williams v. Hunter*, 14 Am. Dec. 599-603; and the note to *Frowman v. Smith*, 12 Am. Dec. 268.

MALICIOUS PROSECUTION—PLEADING—MALICE.—A complaint in an action for malicious prosecution is fatally defective unless it states that the prosecution was malicious, and that plaintiff was acquitted: *Mooney v. Kennett*, 19 Mo. 551; 61 Am. Dec. 576, and note. Averments of malice, of want of probable cause, and of the final determination of the prosecution are generally necessary in an action for malicious prosecution: *Turner v. Walker*, 3 Gill & J. 377; 22 Am. Dec. 329, and note.

FOUNTAIN v. MENARD.

[58 MINNESOTA, 443.]

A PARTNERSHIP MAY BE FORMED BY PAROL TO DEAL IN REAL ESTATE.

O. Tessier and Benjamin Davenport, for the appellants.

Day and Enches, for the respondent.

⁴⁴⁴ GILFILLAN, C. J. The complaint in this action was so drawn as to suggest the question whether the plaintiff was proceeding on ⁴⁴⁵ the theory of a partnership between the parties to deal in the real estate or of an attempt merely to create a trust in it. It does allege a partnership formed for the purpose; and, without an application to require the plaintiff to make the complaint more definite and certain, or to elect on which theory he would proceed, he had a right to prove any cause of action within the allegations of the complaint, and, as there were enough of them to show a case of partnership, the defendants' motion for judgment on the pleadings was properly denied. From the evidence, though it also pointed to the two theories suggested by the complaint, the referee might fairly find that a partnership to buy, improve, and dispose of the real estate was formed. The right to share in the profits or losses, if any, though nothing was expressly agreed on with respect to them, would, of course, follow.

There is no question that a partnership may be formed by parol to deal in real estate (*Hodge v. Twitchell*, 33 Minn. 391; *Newell v. Cochran*, 41 Minn. 378), and we see no reason to doubt that one may be formed to buy, improve, and sell, for joint profit, a particular piece of real estate.

Where real estate is acquired in a partnership business, and for its purposes, it is partnership assets, though the legal title be taken in the name of one of the partners; and in closing the affairs of the concern the court may convert it into personal property for distribution the same as other assets.

There was no prejudicial error in admitting evidence. That in relation to the value of the property and of alleged extra work of plaintiff was immaterial, but no finding of fact is based upon it, and manifestly it could have had no influence upon the findings as made.

Order affirmed.

VANDERBURGH, J., took no part in the decision

A PARTNERSHIP FOR BUYING AND SELLING LANDS FOR PROFIT MAY BE CREATED BY PAROL: *Speyer v. Desjardins*, 144 Ill. 641; 36 Am. St. Rep. 473, and note. See a full discussion of this question in the extended notes to *McCormick's Appeal*, 98 Am. Dec. 197, and *Greene v. Greene*, 13 Am. Dec. 647.

JEFFERSON v. ASCH.

[58 MINNESOTA, 446.]

CONTRACT FOR THE BENEFIT OF A THIRD PERSON, WHEN VOID.—If, in a contract between two persons, one promised the other to do some thing for the benefit of a third person, and the promise has no relation to the thing to be done, nor to the stranger to be benefited, he cannot, by action, enforce such promise. When there is nothing but a promise, no consideration from the stranger, and no duty or obligation to him on the part of the promisee, he cannot sue upon it.

Owen Morris, for the appellants.

F. W. Zollman, for the respondent.

⁴⁴⁸ GILFILLAN, C. J. The Boston Northwest Real Estate Company owned a lot on Sixth street, St. Paul, with two buildings standing on it, and let it to George Benz for the term of five years from May 1, 1889, and about three years thereafter he sublet it for the remainder of his term to Smith & Co. Afterwards Smith & Co. entered into a contract with the

defendant Leithauser to make certain alterations and repairs, and the defendants, Leithauser as principal, and Asch and Boldthen as sureties, executed a bond, in which they acknowledged themselves to be indebted to George Benz, "for the use of the Boston Northwest Real Estate Company," "and all persons who may do work or furnish material" pursuant to said contract, "to be paid to the said George Benz, his executors, administrators, or assigns, for the said use," and which was conditioned to be void if Leithauser should pay "all just claims for all work done and to be done, and all materials furnished and to be furnished, pursuant to said contract, and in the execution of the work therein provided for, as they shall become due, and shall indemnify and save harmless said George Benz and said Boston Northwest Real Estate Company from all mechanics' liens," etc., and "indemnify and save harmless the said George Benz from all claims of whatever description which may arise from, in, or about said work, alterations, and repairs."

The plaintiffs having furnished materials to the contractor for the purposes of the contract bring this action on the bond to recover the price thereof.

The court below sustained a demurrer to the complaint.

From the seals to this bond there arises the presumption of a sufficient consideration to sustain it between the parties to it.

The cases in which one not a party to a contract may sue upon a promise in it for his benefit were at one time limited to contracts not under seal, and this court, in stating the law on the subject, in *Follansbee v. Johnson*, 28 Minn. 311, expressed ⁴⁴⁹ that limitation; but the distinction in this respect between contracts by specialty and simple contracts has not in the later authorities been adhered to, and may now be regarded as abandoned. If there ever was any reason for the distinction, it could only have been a technical one, which no longer has any merit to commend it, and we do not think we ought to recognize it.

Though this seems intended as a mere bond to indemnify and save the obligee named harmless, that, and not any incidental benefit that might accrue to others not parties to it, being the primary purpose of its stipulations and promises, we will treat it, because on both sides it is so presented here, as though such primary purpose were to secure payment to the persons doing work or furnishing material under the contract

mentioned in it. In considering the question presented we must lay aside, as having no bearing upon it, the cases of official or statutory bonds required or authorized for the benefit or security of persons not named as obligee, a nominal obligee being named, and where the statute expressly, or by implication, authorizes such persons to sue upon them. Instances of such are sheriffs' bonds, probate bonds, bonds authorized by the mechanic's lien law in General Statutes of 1878, chapter 90, and such as were considered in *City of St. Paul v. Butler*, 30 Minn. 459, and *Morton v. Power*, 33 Minn. 521.

As, so far as appears by the complaint, Benz could not be liable to pay for the work done and materials furnished in fulfilling the contract to repair, and as, under the law then in force, his interest in the property could not be subject to a lien therefor, it was legally a matter of indifference to him whether the work and materials were paid for or not. He had no duty in respect to it. And the question comes to this: Where, in a contract between two persons, one promises the other to do some thing for the benefit of a stranger to the contract, and the promisee has no relation to the thing to be done, nor to the stranger to be benefited, can such stranger bring an action to enforce the promise?

In some of the text-books and decisions it is stated generally "that, where one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon it." But we do not think there is a case to be found in which such an action was sustained upon a bare promise, with no other circumstances to ⁴⁵⁰ justify an exception to the general rule that an action upon contract can be maintained only where there is privity of contract between the parties. In *Lawrence v. Fox*, 20 N. Y. 268—the most conspicuous and most thoroughly reasoned case in New York sustaining an action by a stranger to a contract—the promisee owed the debt which the promisor agreed to pay, and loaned him the money, which he agreed to pay to the promisee's creditor.

Thorp v. Keokuk Coal Co., 48 N. Y. 253, was a case where the grantee in a conveyance of real estate assumed to pay a mortgage resting on it to secure a debt of the grantor. In the syllabus to the case it is stated that it overrules *King v. Whitely*, 10 Paige, 465, but, as we read the opinion, it goes no further than to question the reason given by the chancellor

in the latter case for sustaining an action in such a case when it can be sustained. The case in 10 Paige was one where the grantee in a conveyance assumed to pay a mortgage on real estate for which the grantor was not personally liable. It was held that the creditor could not recover of the grantee. The chancellor stated as the principle upon which a creditor can recover from a grantee so assuming to pay a debt of the grantor that a creditor is entitled to be subrogated to securities for the debts held by a surety, and that between the grantor and the grantee in such case the latter becomes the principal debtor and the former surety. Another and simpler reason might have been given, to wit, that where one delivers to, or leaves in the hands of, another a fund with which to satisfy an obligation of the former a duty in the nature of a trust is thereby created. The decision in 10 Paige was followed in *Trotter v. Hughes*, 12 N. Y. 74, 62 Am. Dec. 137, and approved in *Garnsey v. Rogers*, 47 N. Y. 233; 7 Am. Rep. 440.

In *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195, similar in its facts to the case of *King v. Whitely*, 10 Paige, 465, the court go over the whole ground, recognize the decision in *Lawrence v. Fox*, 20 N. Y. 268, and hold the two decisions consistent, and follow that in 10 Paige. It lays down this rule: "To give a third party, who may derive a benefit from the performance of the promise, an action there must be: 1. An intent by the promisee to secure some benefit to the third party; and 2. Some privity between the two—the promisee and the party to be benefited—and some obligation or duty from the former to the latter which would give him a legal or equitable claim to the benefit of the ⁴⁵¹ promise, or an equivalent from him personally." "There must be either a new consideration, or some prior right or claim against one of the contracting parties, by which he has a legal interest in the performance of the agreement"; and "there must be some legal right, founded upon some obligation of the promisee, in the third party, to adopt and claim the promise as made for his benefit." In some cases near relationship, as of father and daughter, or uncle and nephew, has been held to supply the place of a strictly legal right in the third party. *Dutton v. Poole*, 1 Vent. 318, and *Felton v. Dickinson*, 10 Mass. 287, are instances of such. To enforce such a promise in favor of a third party, where there is no obligation to benefit him on the part of the promisor or promisee, nor any thing such as near relationship, nor any

consideration from the third party, would be much like enforcing an intended gift or gratuity. *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195, settled the law in New York, as the decision, though subsequently referred to with approval (see *Wilbur v. Warren*, 104 N. Y. 193; *Litchfield v. Flint*, 104 N. Y. 543; *Comley v. Dazian*, 114 N. Y. 161; *Lorillard v. Clyde*, 122 N. Y. 498; *Durnherr v. Rau*, 135 N. Y. 219), has never since been questioned.

The question was considered, and the cases in Massachusetts summed up, in an able and exhaustive opinion by Metcalf, J., in *Mellen v. Whipple*, 1 Gray, 317. That was the case of an agreement by a grantee of real estate to pay a mortgage for which the grantor was not personally liable. It was held the creditor could not recover from the grantee. The court attempts to classify the cases in that state, in which one not a party to the promise has been permitted to sue upon it. The classification may be briefly stated as: 1. Cases where the defendant has in his hands money which, in equity and good conscience, belongs to the plaintiff; as if A put money or property in the hands of B as a fund from which A's creditors are to be paid, and B has promised, expressly or impliedly, to pay such creditors; 2. Cases where a near relationship, as father and child, or uncle and nephew, exists between the promisee and the person to be benefited; 3. The cases of which *Brewer v. Dyer*, 7 Cush. 337, is an instance, in which the defendant agreed ⁴⁵² with a lessee of premises to take the lease and pay the rent to the lessor, and entered with the knowledge of the lessor, paid him the rent for a year, and then left before the term expired.

We have referred so fully to the decisions in New York and Massachusetts, because in those states the question has more frequently arisen, and been more ably and thoroughly discussed, than elsewhere in this country.

There has been no decision of this court at variance with the rule as held in those two states. In every case but one the promise was to pay a debt of the promisee, and a fund was either left or put in the hands of the promisor for the purpose. That one case was decided in a line with the rule held in *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195, and *Mellen v. Whipple*, 1 Gray, 317. A grantee of real estate had assumed a mortgage debt, for which the grantor was not personally liable. It was held the creditor could not recover from the grantee: *Brown v. Stillman*, 43 Minn. 126.

Without undertaking to lay down a general rule defining when a stranger to a promise between others may sue to enforce it, we are prepared to say that where there is nothing but the promise, no consideration from such stranger, and no duty or obligation to him on the part of the promisee, he cannot sue upon it.

Such is this case.

Order affirmed.

VANDEBURGH, J., took no part in the decision.

CONTRACTS FOR THE BENEFIT OF A THIRD PERSON.—This question will be found fully discussed in *Linneman v. Estate of Morosa*, 98 Mich. 178; *ante*, p. 528, and extended note.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

WATSON v. CAMDEN AND ATLANTIC R. R. Co.

[55 NEW JERSEY LAW, 125.]

CARRIERS—NEGLIGENCE—DUTY OF PASSENGER TO ANTICIPATE DANGER FROM RUNAWAY HORSE.—A passenger entitled to safe transportation over a railroad and connecting ferry, who, upon invitation from the railroad company, passes from the ferryboat by a vehicle-way, and while so doing is struck and injured by a wild and uncontrolled runaway horse belonging to the company, is not guilty of contributory negligence so as to prevent recovery. In such case the passenger is not bound to anticipate the career of such horse.

ACTION to recover damages for personal injury. G. S. Watson, the plaintiff in error, was a passenger by the defendant railroad company from Philadelphia to the city of Berlin, in New Jersey. He crossed the Delaware river upon a ferryboat operated by the company in connection with its railway. This boat contained an open passageway for vehicles and animals, and the plaintiff was invited by the employees of the company to pass from the boat upon such way. While doing so, an uncontrolled horse belonging to the company, having escaped from his stable some distance from the ferry, ran wildly through an open gate into the ferry-house, sprang into the vehicle-way, and struck and injured the plaintiff before he could form and execute a plan of escape. Upon the trial a judgment of nonsuit was rendered against the plaintiff, and he brought the case to the appellate court by writ of error.

John W. Wescott, for the plaintiff in error.

S. H. Grey, for the defendant in error.

¹²⁷ The CHANCELLOR. The proofs satisfactorily establish that the plaintiff was practically invited by the defendant's employees to pass from the boat by the vehicle-way. The northerly passenger exit was closed. The southerly exit was ¹²⁸ narrow. When the boat was made fast to the bridge, although there were no animals or vehicles upon it, a gang-plank, or slide, was drawn to it from the bridge, and the vehicle-way gate, behind which there was a waiting crowd, was thrown open, as though a signal to the crowd to pass off that way.

The plaintiff was among the first of those who availed themselves of this offered exit.

The use for which the way he took was designed was the transfer of controlled animals and vehicles to and from the boat. Passage over it brought to him knowledge of its customary use, and suggested a prudent watchfulness against the dangers attendant upon that use. In other words, it was a place of obvious danger from a certain use, against which it was the plaintiff's duty to guard, and the invitation to pass that way did not absolve him from the reasonable performance of his duty in this respect. But the duty did not extend to dangers from causes *ab extra* that use, such as the rapid, uncontrolled career of a wild horse, whose course was undirected, irregular, and regardless of any way, and who, as he madly ran at random, happened to spring over the end of the bow to the place where the plaintiff was injured. We think that it was not the plaintiff's duty to anticipate use of the driveway by a runaway horse of the defendant, and, speaking with more particularity, to anticipate the bolting of such a horse over the end of the bow into the driveway. I am satisfied that this case is within the reasoning of the well-considered case of the *New York etc. R. R. Co. v. Ball*, 53 N. J. L. 283, which cannot fail to elicit approval.

It is not perceived that there was negligence upon the part of the plaintiff which contributed to the injury of which he complains. Hence, we are of opinion that he was improperly nonsuited.

The judgment below must be reversed, that a *venire de novo* may issue.

CONTRIBUTORY NEGLIGENCE.—DUTY TO ANTICIPATE ACCIDENT.—One is not bound to guard against the want of ordinary care on the part of another: *Brown v. Lynn*, 31 Pa. St. 510; 72 Am. Dec. 768. The failure to take certain precautions will not be regarded as negligence on the part of the plaintiff.

tiff if, under all the circumstances of the case, a person of ordinary care and prudence would have been justified in omitting to use them: *Cleveland etc. R. R. Co. v. Crawford*, 24 Ohio St. 631; 15 Am. Rep. 633. This question is discussed in the extended note to *Freer v. Cameron*, 55 Am. Dec. 672.

MONMOUTH PARK ASSN. v. WALLIS IRON WORKS.

[55 NEW JERSEY LAW, 182.]

CONTRACTS—CONSTRUCTION.—A written contract should be construed according to the obvious intention of the parties, notwithstanding clerical errors or omissions therein which can be corrected by perusing the whole instrument.

DAMAGES—WHEN LIQUIDATED AND WHEN A PENALTY.—In determining whether a sum, which contracting parties have declared payable on default in the performance of their contract, is to be deemed a penalty or liquidated damages the agreement of the parties as ascertained from the whole instrument, if fair, must control. If they have provided for larger damages than the law permits, or have provided for the same damages on the breach of any one of several stipulations, when the loss resulting from such breaches must clearly differ in amount, or have named an excessive sum in a case where the real damages are certain or readily reducible to certainty by proof before a jury, or a sum which it would be unconscionable to award, under any of these conditions the sum designated is deemed a penalty.

LIQUIDATED DAMAGES OR PENALTY.—If it is doubtful from the whole agreement whether a sum named therein is intended as a penalty or as liquidated damages it should be construed as a penalty, because the law favors mere indemnity.

LIQUIDATED DAMAGES.—When damages sustained by the breach of a single stipulation in a contract are uncertain in amount, and not readily susceptible of proof, then if the parties have expressly agreed upon a sum as the measure of compensation for the breach, and that sum is not disproportionate to the presumable loss, it may be recovered as liquidated damages.

LIQUIDATED DAMAGES.—Stipulations for specified or liquidated damages on the breach of a contract to build within a limited time are enforceable.

BUILDING CONTRACTS—LETTER AS EVIDENCE.—In an action to recover under a building contract, a letter written by the chief engineer of the builder after the completion of the work, and after the writer had left the employ of the builder, and without notice to him, is not admissible in evidence as a decision of a matter concerning the work, which, under the terms of the contract, was to be left to the decision of the chief engineer of such builder.

BUILDING CONTRACTS—CONSTRUCTION.—When a building contract provides that final payment thereunder is to be made on the contractor's furnishing satisfactory evidence that no liens or unsatisfied claims exist on the work, the fact that no claims have been filed against it within one year after filing such contract affords the required evidence.

ACTION to recover final payment under a building contract. Judgment for plaintiff, and the defendant prosecutes a writ of error to this court. The following is a copy of the contract:

"Articles of agreement made and concluded this first day of October, A. D. 1889, by and between the Wallis Iron Works, a corporation of New Jersey, of the first part, and the Monmouth Park Association of the second part:

"Witnesseth, That for and in consideration of the covenants and payments hereinafter mentioned, to be made and performed by the said party of the second part, the said party of the first part doth hereby covenant and agree to furnish all the labor and materials, and perform the work necessary to complete in the most substantial and workmanlike manner, to the satisfaction and acceptance of the chief engineer of the said party of the second part, a grand-stand at the racecourse of said party of the second part, at Monmouth park, Monmouth county, New Jersey, excepting the necessary excavation and incidental thereto, the said work to be finished as described in the approved plans and following specifications, and agreeably to the directions received from the said chief engineer, on or before the first day of March, 1890. In case the said party of the first part shall fully and entirely, and in conformity to the provisions and conditions of this agreement, perform and complete the said work, and each and every part and appurtenance thereto, within the time hereinbefore limited for such performance and completion, or within such further time as in accordance with the provisions of this agreement shall be fixed or allowed for such performance and completion, the said party of the first part shall and will pay to the said party of the second part the sum of one hundred dollars for each and every day that they, the said party of the first part, shall be in default, which said sum of one hundred dollars per day is hereby agreed upon, fixed, and determined by the parties hereto as the damages which the party of the second part will suffer by reason of such default, and not by way of penalty. And the said party of the second part may and shall deduct and retain the same out of any moneys which may be due, or become due, to the party of the first part under this agreement.

" SPECIFICATION.

"The entire work to be constructed and finished in every part in a good, substantial, and workmanlike manner, accord-

ing to the accompanying drawings and specifications, to the full extent and meaning of the same, and to the entire satisfaction, approval, and acceptance of the chief engineer and owners of the said party of the second part; and under the supervision and direction of such agent or agents as they may appoint. Additional detail and working drawings will be furnished, in exemplification of the foregoing, from time to time, as may be required; and it is distinctly understood that all such additional drawings are to be considered as virtually embraced within, and forming part of, these specifications. Figured dimensions shall in all cases be taken in preference to scale measurements.

"The said engineer shall have the right to make any alterations, additions, or omissions of work or materials herein specified, or shown on the drawings, during the progress of the structure, that he may find to be necessary, and the same shall be acceded to by the said party of the first part, and carried into effect, without in any way violating or vitiating the contract. If any additions, alterations, or omissions are made in the structure during the progress of the work the value of such shall be decided by the said chief engineer, who shall make an equitable allowance for the same, and shall add the amount of said allowance to the contract price of the work, if the cost has been increased; or shall deduct the amount, if the cost has been lessened, as he, the said chief engineer, may deem just and equitable.

"The said party of the second part will pay for no extra work or material unless ordered in writing by them through their treasurer.

"Any disagreement or difference between the parties to this contract, upon any matter or thing arising from these specifications, or the drawings to which they refer, or to the contract for the work, or the kind or quality of the work, required thereby, shall be decided by the said chief engineer of the party of the second part, whose decision and interpretation of the same shall be considered final, conclusive, and binding upon both parties.

"All materials and labor used throughout the structure must be of the best of their several kinds, and subject to the approval of the chief engineer.

"The said chief engineer shall have full power at any time during the progress of the work to reject any materials that he may deem unsuitable for the purpose for which they were

intended, or which are not in strict conformity with the spirit of these specifications. He shall also have the power to cause any inferior or unsafe work to be taken down and altered at the cost of the said party of the first part. Particular care must be taken of all the finished work, which work must be covered up, and thoroughly protected from injury or defacement during the erection and completion of the structure.

"All refuse material and rubbish that may accumulate during the progress of the work shall be removed, from time to time, as may be directed by the chief engineer; and, on the completion of the work, the structure, grounds, and streets be thoroughly cleaned up and the surplus material and rubbish removed. The said party of the second part will not transport free any of the workmen or materials for this work, but all materials must be *be* shipped in the name of the party of the first part, and in no case shall it be shipped in care of, or in the name of, the company, or any of its officers or employees, and said party of the first part must pay the regular freight rates arranged for with the freight department. And the said party of the second part doth promise and agree to pay to the said party of the first part for the work to be done under this contract the following prices, to wit: One hundred and thirty-three thousand (\$133,000) dollars.

"On or about the last day of each month, during the progress of this work, an estimate shall be made of the relative value of the work done and delivered, to be judged by the engineer; and ninety per cent of the amount of said estimate shall be paid to the party of the first part on or about the fifteenth day of the following month.

"And when all the work embraced in this contract is completed, agreeably to the specifications, and in accordance with the directions and to the satisfaction and acceptance of the engineer, there shall be a final estimate made of said work, according to the terms of this agreement, when the balance appearing due to the said party of the first part shall be paid to them within thirty days thereafter, upon their giving a release, under seal, to the party of the second part, from all claims and demands whatsoever growing in any manner out of this agreement, and upon their procuring and delivering to the parties of the second part full releases, in proper form and duly executed, from mechanics and materialmen, of all liens, claims, and demands for materials furnished and

provided, and work and labor done and performed upon or about the work herein contracted for under this contract.

"It is further covenanted and agreed between the said parties that the said party of the first part will at all times give personal attention, by competent representative, who shall superintend the work.

"It is further agreed that the contractors are not to interfere in any way with the construction of the bookmaker's-stand, member's-stand, or the paddocks, or other work. It is further agreed and understood that the work embraced in this contract shall be commenced within ten days from this date, and prosecuted with such force as the engineer shall deem adequate to its completion within the time specified; and if at any time the said party of the first part shall refuse or neglect to prosecute the work with a force sufficient, in the opinion of the said engineer, for its completion within the time specified in this agreement, then, in that case, the said engineer in charge, or such agents as the engineer shall designate, may proceed to employ such a number of workmen, laborers, and overseers as may, in the opinion of the said engineer, be necessary to insure the completion of the work within the time hereinbefore limited, at such wages as he may find necessary or expedient to give, pay all persons so employed, and charge over the amount so paid to the party of the first part as for so much money paid to them on said contract; or for the failure to prosecute the work with an adequate force, for noncompliance with his directions in regard to the manner of constructing it, or for any other omission or neglect of the requirements of this agreement and specifications on the part of the party of the first part, the said engineer may, at his discretion, declare this contract, or any portion or section embraced in it, void.

"And the said party of the first part hath further covenanted and agreed *wo* take, use, provide, and make all proper, necessary, and sufficient precautions, safeguards, and protections against the occurrence or happening of any accidents, injuries, damages, or hurt to any person or property during the progress of the construction of the work herein contracted for, and to be responsible for, and to indemnify and save harmless the said parties of the second part, and the said engineer, from the payments of all sums of money by reason of all or any such accidents, injuries, damages, or hurt that may happen or occur upon or about said work, and from all fines, pen-

alties, and loss incurred for or by reason of the violation of any city or borough ordinance or regulation, or law of the state, while the said work is in progress of construction.

"And it is mutually agreed and distinctly understood that the decision of the chief engineer shall be final and conclusive in any dispute which may arise between the parties to this agreement, relative to or touching the same.

"In witness whereof, that parties herein named have hereunto set their seals, and caused their presents to be signed by their secretary, the day and year herein first above named.

"As to Wallis Iron Works, WALLIS IRON WORKS. [SEAL]

"James I. Taylor, Wm. T. Wallis, Sec'y.

"Witness to signature of THE MONMOUTH PARK ASS'N.

"A. J. Cassatt: By A. J. Cassatt. [SEAL]

"T. M. Croft. President.

"It is hereby further agreed that, in addition to the work hereinbefore described and provided for, the said party of the first part shall provide as bearing-pieces to receive ends of purlins, and in lieu of the angle irons already provided for, 3" x 6" angle irons, 10 $\frac{3}{8}$ lbs. per foot, and 7 feet long, well bolted to roof truss and to purlin ends.

"The party of the first part will also construct, complete, the front steps to grand-stand, as per revised sheet No. 26.

"In consideration of the foregoing changes the party of the second part agrees to pay the additional sum of nineteen hundred and seventy-one (\$1,971.61) dollars.

"Witness this 11th day of WALLIS IRON WORKS. [SEAL]

"December, 1889. Wm. I. Wallis, Treas.

"T. M. Croft. THE MONMOUTH PARK ASS'N.

By A. J. Cassatt. [SEAL]

President."

Added to this are "Revised Specifications," the last clause of which is:

"PAYMENTS.

"On or about the first day of each month the engineer will make an appropriate estimate of the amount of work erected and delivered under these specifications during the preceding month, and the contractor will be paid ninety per cent of the amount of these estimates. Thirty days after the acceptance of the completed work by the owner the retained ten per cent will be paid the contractor, upon his furnishing satisfactory evidence that no liens or unsatisfied claims exist on the work, or any part of it."

Joseph D. Bedle, for the plaintiff in error.

Gilbert Collins, for the defendant in error.

¹³⁹ DIXON, J. The first exception to be considered took its rise from the fact that the structure was not completed within the time limited by the contract, nor until ninety-four days after the expiration of a month's extension of that time. The defendant claimed a deduction, or setoff, of one hundred dollars for each day's delay.

The plaintiff met this claim by insisting that the clause in the contract mentioning the one hundred dollars per day is unintelligible, and ¹⁴⁰ therefore nugatory, because in its opening line it reads: "In case the said party of the first part shall . . . to fully and entirely," etc., omitting any effective verb.

We agree, however, with the trial judge in thinking that the context shows the verb which should be supplied. It makes the one hundred dollars payable for each day that "the party of the first part shall be in default." This plainly indicates the verb "fail" as the omitted word, to be supplied as an equivalent for the expression "be in default."

The right of a court of law to read an instrument according to the obvious intention of the parties, in spite of clerical errors or omissions which can be corrected by perusing the instrument, is sufficiently vindicated by the decision of this court in *Sisson v. Donnelly*, 36 N. J. L. 432; see, also, *Burchell v. Clark*, 2 C. P. Div. 88.

Taking the clause thus perfected, the plaintiff urged that the one hundred dollars a day was a penalty, and so the trial judge ruled, requiring that the defendant should prove the actual damages, and be allowed only for what was proved. To this ruling the defendant excepted.

In determining whether a sum, which contracting parties have declared payable on default in performance of their contract, is to be deemed a penalty or liquidated damages, the general rule is that the agreement of the parties will be effectuated. Their agreement will, however, be ascertained by considering, not only particular words in their contract, but the whole scope of their bargain, including the subject to which it relates. If, on such consideration, it appears that they have provided for larger damages than the law permits, e. g., more than the legal rate for the nonpayment of money, or that they have provided for the same damages on the breach of any one

of several stipulations, when the loss resulting from such breaches clearly must differ in amount, or that they have named an excessive sum in a case where the real damages are certain or readily reducible to certainty by proof before a jury, or a sum which it would be unconscionable to award, under any of these conditions the sum designated is deemed a penalty.

¶ And, if it be doubtful on the whole agreement whether the sum is intended as a penalty or as liquidated damages, it will be construed as a penalty, because the law favors mere indemnity. But when damages are to be sustained by the breach of a single stipulation, and they are uncertain in amount, and not readily susceptible of proof under the rules of evidence, then, if the parties have agreed upon a sum as the measure of compensation for the breach, and that sum is not disproportionate to the presumable loss, it may be recovered as liquidated damages. These are the general principles laid down in the text-books and recognized in the judicial reports of this state: *Cheddick v. Marsh*, 21 N. J. L. 463; *Whitfield v. Levy*, 35 N. J. L. 149; *Hoagland v. Segur*, 38 N. J. L. 230; *Lansing v. Dodd*, 45 N. J. L. 525.

In the present case the default consists of the breach of a single covenant to complete the grand-stand, as described in the approved plans and specifications, within the time limited. It is plain that the loss to result from such a breach is not easily ascertainable. The magnitude and importance of the grand-stand may be inferred from its cost—one hundred and thirty-three thousand dollars. It formed a necessary part of a very expensive enterprise. The structure was not one that could be said to have a definable rental value. Its worth depended upon the success of the entire venture. How far the noncompletion of this edifice might affect that success, and what the profits or losses of the scheme would be, were topics for conjecture only. The conditions therefore seem to have been such as to justify the parties in settling for themselves the measure of compensation.

The stipulations of parties for specified damages, on the breach of a contract to build within a limited time, have frequently been enforced by the courts. In *Fletcher v. Dyche*, 2 Term Rep. 32, ten pounds per week for delay in finishing the parish church; in *Duckworth v. Alison*, 1 Mees. & W. 412, five pounds per week for delay in completing repairs of a warehouse; in *Legge v. Harlock*, 12 Q. B. 1015, one pound per day for delay in erecting a barn, wagon-shed, and granary; in

Law v. Local Board of Redditch, 1 Q. B. 127, one hundred pounds and five pounds per week for ¹⁴³ delay in constructing sewerage works; in *Ward v. Hudson River Building Co.*, 125 N. Y. 230, ten dollars a day for delay in erecting dwelling-houses; and in *Malone v. City of Philadelphia*, 147 Pa. St. 416, fifty dollars a day for delay in completing a municipal bridge—were all deemed liquidated damages. Counsel has referred us to two cases of building contracts where a different conclusion was reached: *Muldoon v. Lynch*, 66 Cal. 536, and *Clement v. Schuylkill River R. R. Co.*, 132 Pa. St. 445. In the former case a statutory rule prevailed, and in the latter the real damage was easily ascertainable, and the stipulated sum was unconscionable. In the case at bar we have no data for saying that one hundred dollars a day was unconscionable.

The sole question remaining on this exception, therefore, is whether the parties have agreed upon the sum named as liquidated damages.

Their language seems indisputably to have this meaning. They expressly declare the sum to be agreed upon as the damages which the defendant will suffer; they expressly deny that they mean it as a penalty, and they provide for its deduction and retention by the defendant in a mode which could be applied only if the sum be considered liquidated damages.

But it is argued that as the contract authorized the engineer of the defendant to make any alterations or additions that he might find necessary during the progress of the structure, and required the plaintiff to accede thereto, it is unreasonable to suppose that the plaintiff could have intended to bind itself in liquidated damages for delay in completing such a changeable contract.

But this argument seems to be, aside from the present inquiry, which is not whether the plaintiff became responsible for damages by reason of the noncompletion of the grandstand on the day named, but whether, if it did become so responsible, those damages are liquidated by the contract. On the question first stated, changes ordered by the engineer may afford matter for consideration; on the second question, they are irrelevant.

¹⁴³ Certainly, the bills of exceptions do not indicate any alterations or additions which, as matter of law, would relieve the plaintiff from responsibility for the admitted delay, and consequently there may have been ground for considering the

defendant's damages. If there was, the amount of the damages was adjusted by the contract at one hundred dollars per day.

We think the ruling at the circuit on this point was erroneous.

We think, also, that the letter, Exhibit P 8, written September 10, 1890, by F. Latourette to the plaintiff, was illegally received in evidence. It was offered and admitted as a decision by the chief engineer of the defendant under the contract. Since it was written after the completion of the work, and after the writer had ceased to be the engineer of the defendant, and without notice to the defendant, it could not possess the character attributed to it.

The only other exception which it appears useful to notice is that relating to the existence of claims by outside parties.

The agreement contains two clauses on this subject—one under the head "Specification"; the other under the head "Revised Specifications." It seems proper to hold that the latter clause is substituted in the contract for the former, and therefore it only need be considered. It reads: "Thirty days after the acceptance of the completed work by the owner the retained ten per cent will be paid the contractor, upon his furnishing satisfactory evidence that no liens or unsatisfied claims exist on the work, or any part of it."

The expression "liens or unsatisfied claims *on the work*" must mean claims which can be enforced against the work, and such claims could exist only under our mechanic's lien law. By "liens" the parties intended claims filed under that law; by "unsatisfied claims" they intended claims which were not, but might be, filed under that law.

The statute (Rev. Stats., sec. 2, p. 668) provides "that when any building shall be erected in whole or in part by contract in writing, such building and the land whereon it stands shall be liable to the contractor alone for the work done or materials ¹⁴⁴ furnished in pursuance of such contract; *provided*, such contract or a duplicate thereof be filed in the office of the clerk of the county in which such building is situate, before such work done or materials furnished"; and (sec. 13) "that no debt shall be a lien by virtue of this act, unless a claim is filed, as hereinbefore provided, within one year from the furnishing the materials or performing the labor for which such debt is due."

The contract between these parties was filed January 2, 1890. Hence, no liens could arise in favor of outside parties for work done or materials furnished after that date. For work done or materials furnished before that date no debt would be a lien unless a claim were filed within a year, i. e., before January 2, 1891. At the date last named no such claim was filed, and, so far as appears, no such claim was ever filed. The suit was commenced March 12, 1891.

We think these facts furnished satisfactory evidence that there were no liens or unsatisfied claims on the work when the action was brought, and that on this point there was no error at the trial.

The other exceptions adverted to by counsel for the defendant are either untenable or on questions not likely to arise upon a new trial.

Let the judgment be reversed, and a *venire de novo* be awarded.

CONTRACTS—CONSTRUCTION—INTENT.—All contracts must be so construed as to accomplish the intention of the parties: *Grant v. Leach*, 20 La. Ann. 329; 96 Am. Dec. 403; *Dunbar v. Rawles*, 28 Ind. 225; 92 Am. Dec. 311, and note; *Hunter v. Anthony*, 8 Jones, 385; 80 Am. Dec. 333, and note; *Crabtree v. Hagenbaugh*, 25 Ill. 233; 79 Am. Dec. 324, and note; *Mathews v. Phelps*, 61 Mich. 327; 1 Am. St. Rep. 581; *Smith v. Kerr*, 108 N. Y. 31; 2 Am. St. Rep. 362; *Martin v. Stoller*, 107 Mo. 317. See the further notes to *Cravens v. Eagle Cotton Mills*, 16 Am. St. Rep. 306, and *Chism v. Schipper*, 14 Am. St. Rep. 675, where the cases on this subject are collected.

DAMAGES WHEN LIQUIDATED AND WHEN PENALTY.—When a lump sum is named by the parties to a contract as compensation for loss suffered, the presumption is that the sum named is intended as a penalty, and not as liquidated damages, no matter what it is called in the contract, the controlling element being the intent of the parties: *Keck v. Bieber*, 148 Pa. St. 645; 33 Am. St. Rep. 846, and note; *Bagley v. Peddie*, 16 N. Y. 469; 69 Am. Dec. 713, and note; *Foley v. McKeegan*, 4 Iowa, 1; 66 Am. Dec. 107; *California Steam Nav. Co. v. Wright*, 6 Cal. 259; 65 Am. Dec. 511, and note. See the extended notes to *Williams v. Vance*, 30 Am. Rep. 28, and *Graham v. Bickham*, 1 Am. Dec. 331.

AGRICULTURAL INSURANCE COMPANY v. POTTS.

[55 NEW JERSEY LAW, 154.]

CORPORATIONS—DECLARATIONS OF AGENT AS EVIDENCE.—A statement by a general agent of a corporation, in the course of his employment, as to a fact, within his official knowledge, touching the *status* of a matter intrusted to him, is admissible in evidence on behalf of the party with whom the corporation was dealing at the time.

INSURANCE—WAIVER OF FORFEITURE.—When a party insured against fire obtains additional insurance without the written consent of the insurer, as provided by the policy, and then notifies the special agents of the latter of the fact, and they, after notifying the insurer, are directed by him to cancel the policy, which they fail to do until after the loss, the insurer is estopped from claiming the enforcement of the strict letter of the policy, and from setting up a forfeiture thereof.

INSURANCE—WAIVER OF FORFEITURE.—Any course of action on the part of an insurer which leads an insured honestly to believe that, by conforming thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, estops the insurer from insisting upon a forfeiture though it might be claimed under the express letter of the contract.

James Buchanan and A. H. Sawyer, for the plaintiff in error.

John S. Voorhees, for the defendant in error

159 GARRISON, J. The sole error assigned is the refusal of the trial court to nonsuit the plaintiff. The action is brought upon a policy of insurance issued by the defendant, indemnifying the plaintiff against loss by fire to the amount of fifteen hundred dollars upon her dwelling. The policy contains, amongst other things, a stipulation in these words: "If any other insurance has been, or shall hereafter be, made upon the property hereby insured, or any part thereof, or any interest therein, whether such insurance is valid or invalid, this entire policy, and every part thereof, shall be null and void, unless the written consent of the company at the New York city office is obtained. In case such consent is applied for and refused, the company will pay to the assured the unearned premium." The policy also declares that "no agent is permitted to give the consent of the company in any other case required by the provisions of this policy, or to waive any stipulation or condition contained therein; but in all cases where the consent of the company is required by this policy, other than consent to the assignment of the policy, such consent must be obtained in writing, and at the New York city office."

The policy was obtained through Wright and Marsh, insurance agents, at Princeton, in this state, who received the premium for the company, and delivered the policy to the plaintiff. The policy was issued in 1885. On the third day of January, 1888, the plaintiff insured her said dwelling in the additional amount of three hundred dollars in the Liverpool and London, and Globe Insurance Company. The plaintiff testified that the day after she got this latter insurance she went to Princeton to the office of Wright and Marsh, having with her the policy in defendant's company, and told Mr. Marsh that she had taken out more insurance on her building, whereupon Marsh requested his partner to "see ¹⁶⁰ to it." The plaintiff's narrative of what then occurred is as follows: "Mr. Wright got up from his desk and went to a drawer, and took out a paper with marks of a building on it, and wrote something on it, and put it back again. Mr. Marsh was present, and asked me with whom I had insured, and where, and I distinctly told him, and he said, 'It is all right; perhaps the Agricultural company may cancel your policy if they think you have too much on your buildings, but we will let you know in a few days.'" This was on January 4th, and on the twentieth day of May, of the same year, the plaintiff's dwelling was destroyed by fire, neither Marsh and Wright, nor the Agricultural company, having communicated with the plaintiff in the mean time. It is also in evidence that after the occurrence of the fire Mr. Patterson, the general agent of the defendant, in charge of its New York office, visited the scene of the fire, and drew up and obtained the signature of the plaintiff to the formal proofs of loss, and attempted to adjust the same for a sum less than the value of the policy.

The plaintiff also called as her witness Crowell Marsh, of the firm of Wright and Marsh, who testified that he was the agent of the defendant company, at Princeton, and that the custom of the company, with respect to applications for further insurance, was that the local agent, if he deemed the request reasonable and right, wrote on the policy the indorsement "other insurance permitted," and reported the fact to the company, who, if they dissented, ordered him "to cancel the policy, to take it up." He further testified that it was not the practice of the company to make any indorsement itself, but merely to sanction his indorsement or to order him to cancel the policy, and that in all the number of years he had had dealings with the company he could recollect no case in

which the indorsement on any policy obtained through his firm had been made by anybody other than himself or his partner, and that they never knew any person other than Mr. Patterson as the representative of the company. The custom of the company in this respect was likewise shown by individual instances in which it had been followed, and by the indorsement on ¹⁶¹ plaintiff's policy of the words "The buildings insured under this policy are now in possession and occupied by tenant. Indorsed May 1, 1885. Marsh and Wright, agents."

There was no proof of any custom by which the agents of the defendant were permitted to give the assent of the company in cases where additional insurance had already been actually obtained. In this state of the proofs the court was asked to nonsuit the plaintiff upon the ground that the policy sued on by its terms had become null and void, by reason of the further insurance of the property comprised therein without the written consent of the defendant at its New York city office.

All of the facts assumed in this proposition are indubitably established by the plaintiff's proofs. So that the question presented is whether, in the face of these facts, there was any ground of recovery upon which the case should have gone to the jury. The points chiefly argued in this court were: "1. As to the power of an agent to waive the conditions of the policy in the face of its express declaration that such power was not delegated"; and "2. Whether the defendant company, by sanctioning indorsements made by its agents upon policies where further insurance was contemplated had clothed such agents with apparent authority to continue in force a policy that, by its terms, had become null and void because such further insurance had already been actually obtained." Any discussion of the implied powers of agents to waive the express conditions of written contracts would seem, however, to be far-fetched in the present case, in view of the uncontroverted testimony as to the conduct of the insurance company itself. It is in evidence that Mr. Patterson, the general agent of the defending corporation, visited the plaintiff after the fire upon the business of the defendant, and endeavored to adjust her loss for a sum less than the amount insured, averring, amongst other things, on behalf of the company he was representing, that "they had notified the agent to cancel this policy, but it had been neglected."

By this declaration the defendant's agent imparted pertinent information touching ¹⁶² matters to the consideration of which he had invited the plaintiff. It was made in the supposed interest of his principal and was part of the *res gestæ*. A statement made by a general agent of a corporation, in the course of his employment, as to a fact within his official knowledge touching the *status* of a matter intrusted to him is admissible in evidence on behalf of the party with whom the corporation was dealing: Wharton on Evidence, sec. 1173; *Runk v. Ten Eyck*, 24 N. J. L. 756.

From this declaration of the defendant's general manager it was competent for a jury to infer that actual notice had been received by the defendant of some state of affairs respecting plaintiff's risk that justified, in defendant's opinion, a cancellation of her policy; and, inasmuch as the only fact of this nature, of which the case gives any indication, is that communicated by the plaintiff to Wright and Marsh, a further inference might be that the local agents had forwarded the information received by them to the company as they promised plaintiff they would do, and that the company, taking the view of the risk intimated by Wright and Marsh to the plaintiff, had decided upon the cancellation of her policy, and that Wright and Marsh were the agents whom Mr. Patterson had in mind when he said that the company had notified the agent to cancel the policy in question. At all events, the evidence referred to, if not free from ambiguity standing alone, when taken in connection with the rest of the plaintiff's testimony was competent proof to go to the jury for the purpose of establishing the following facts:

1. That the company had actual knowledge of the condition of the plaintiff's insurance, and of her submission of the matter to the local agents who forwarded the information.

2. That the defendant recognized the duty of acting decisively upon the facts thus submitted, and had actually made its decision.

3. That the defendant had intrusted the execution of the decision thus reached to Wright and Marsh. That Wright and Marsh did nothing toward carrying into execution this decision of the company during the months that preceded the ¹⁶³ fire is an admitted fact, and it must, I think, be likewise admitted that the plaintiff was damnified by reason of their negligence. All of the evidence points conclusively to the fact that it was the settled purpose

and constant practice of the plaintiff to keep her dwelling fully insured. The very circumstance of her obtaining from the Liverpool and London, and Globe Company an insurance of three hundred dollars in addition to the sum of fifteen hundred dollars already placed in the defendant company repels the notion that she would have allowed her dwelling to remain practically uninsured had the decision of the latter company canceling its policy been made known to her. At the close of the plaintiff's case, therefore, there was testimony competent to prove that the plaintiff had in good faith submitted to her insurers actual knowledge of a state of facts that placed it wholly within their power either to continue their contract of indemnity or to relieve themselves of all obligation respecting it; that they took the matter under advisement and decided upon the latter course, which decision, owing to the laches of the agent to whom its execution was intrusted, was not communicated to the insured until she had been injured by fire. The case thus presented would, in my opinion, come within the elemental rule of estoppel that in dealing with others no one shall be permitted to deny that he intended the natural consequences of his conduct, when such conduct has in fact induced others to rely upon it to their loss. The natural consequence of the failure of the company to communicate to the plaintiff its decision was to induce in her the belief that it acquiesced in the further insurance of which she had given notice, and so long as this belief continued she was lulled into a false security with respect to her property. After the loss had occurred it was too late for the company to set up for the first time, in avoidance of its obligation, the very state of facts with full knowledge of which it had permitted the plaintiff to rest secure in her proposed protection. In *New York Life Ins. Co. v. Eggleston*, 96 U. S. 572, the policy provided for an absolute forfeiture in the event of the nonpayment of any premium. The last ¹⁶⁴ installment of premium remained unpaid at the death of the insured. At the trial the plaintiff proved that the company had several times changed its agents, and had each time notified the insured where to pay his premium, and that while waiting for such information the last installment had become overdue, and so remained at the time of the death of the insured. Mr. Justice Bradley affirmed the charge of the trial court, leaving the question of fact to the jury, saying: "Any course of action on the part of an insurance company.

which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract." And to a like effect are *Phoenix Mut. Life Ins. Co. v. Doster*, 106 U. S. 30; *Combs v. Shrewsbury etc. Ins. Co.*, 34 N. J. Eq. 403; *Redstrake v. Cumberland etc. Ins. Co.*, 44 N. J. L. 294, 300.

That Wright and Marsh, in respect to the cancellation of plaintiff's policy, were the agents of the defendant, and not of the plaintiff, cannot be seriously questioned. Granting that they were her agents for the purpose of communicating to the defendant the *status* of her insurance, the company, by intrusting them with the execution of its decision touching a matter solely within its power, constituted them its agents, so that their negligence in this respect was the negligence of the insurer. There is, it is needless to say, a marked distinction between cases such as this, in which notice given to an agent is in point of fact communicated to the principal, and those in which the principal is charged upon mere proof of notice to an agent. In the former case the power of the agent to bind his principal is limited by the scope of his actual or apparent authority; whereas, in the latter case, no question of agency arises, the sole question being as to the legal duties of the principals themselves, growing out of knowledge actually imparted. For a like reason the present case is uncomplicated by any question as to the delegation of the power of ¹⁶⁵waiver. Whatever difference of opinion may exist as to the effect of notice to, or of waiver by, a special agent in a given case there can be no diversity of sentiment as to the plenary power of a party to a contract to waive any condition intended for his benefit, either before or after forfeiture, whether by express declaration or by conduct so misleading that it estops him afterward from claiming the forfeiture.

Our conclusion upon the case before us is that the trial court, in refusing the defendant's motion to nonsuit the plaintiff, ruled correctly, and that the judgment recovered should be affirmed, with costs.

JUSTICES REED, DIXON, and MAGIE dissented on the ground that the policy in suit was void the moment that additional insurance was obtained without the consent of the insurer, and could only be revived by subsequent writ-

ten consent. Hence, the delay of the insurer in announcing his conclusion to accept or refuse to renew the policy after the additional insurance was effected did not estop him from insisting upon a forfeiture, nor did the statement made by his general agent that "they had notified the agent to cancel this policy, but it had been neglected," estop the insurer from successfully claiming that the policy was void.

EVIDENCE—DECLARATIONS OF AGENT AS.—The declaration of an agent made during the progress of a transaction, in which he represents his principal, is competent evidence: *Oskamp v. Gadsden*, 35 Neb. 7; 37 Am. St. Rep. 428; *Empire Mill Co. v. Lovell*, 77 Iowa, 100; 14 Am. St. Rep. 272, and note; *Adams Express Co. v. Harris*, 120 Ind. 73; 16 Am. St. Rep. 315; *Siuey etc. Furniture Co. v. Warsaw School Dist.*, 122 Pa. St. 494; 9 Am. St. Rep. 124.

INSURANCE—WAIVER OF FORFEITURE BY ACTS OF INSURER.—The waiver of a condition in a policy of insurance in favor of the company need not be express. It may be inferred from the acts of the insurer evidencing a recognition of liability after the condition is broken: *Bonnert v. Pennsylvania Ins. Co.*, 129 Pa. St. 558; 15 Am. St. Rep. 739, and note; *Weidert v. State Ins. Co.*, 19 Or. 261; 20 Am. St. Rep. 809; *Queen Ins. Co. v. Young*, 86 Ala. 424; 11 Am. St. Rep. 51, and extended note; *Home Protection etc. v. Avery*, 85 Ala. 348; 7 Am. St. Rep. 54. A forfeiture of a policy for a default of the assured is waived by recognizing the continued validity of the policy: *Murray v. Home Benefit etc. Assn.*, 90 Cal. 402; 25 Am. St. Rep. 133, and note. See, also, the note to *Farnum v. Phoenix Ins. Co.*, 17 Am. St. Rep. 247.

INSURANCE.—WAIVER OF CONDITIONS BY AGENT: See *Beebe v. Ohio etc. Ins. Co.*, 93 Mich. 514; 32 Am. St. Rep. 519, and note, with the cases collected.

DIMOCK v. UNITED STATES NATIONAL BANK.

[55 NEW JERSEY LAW, 296.]

LOANS—DEMAND OF PAYMENT.—When a time note is given with a pledge of stocks as collateral security under an agreement that in case of depreciation in the market value of the securities the maker of the note shall, upon demand, make a payment on account, so that the market value of the securities shall be more than the amount unpaid, a depreciation in the market value of the securities before the maturity of the note does not convert the loan into a call loan, and a call for the whole amount of the loan at such time is not a demand in conformity with the condition in the contract.

STOCKS—CONVERSION—MEASURE OF DAMAGES.—The rule that the measure of damages for the conversion of property is its market value at the time of the conversion does not apply to the conversion of stocks and bonds or other commercial securities, the market value of which is liable to great fluctuations in a short time.

STOCK—CONVERSION—MEASURE OF DAMAGES.—The true measure of damages for a conversion of stock and bonds is their highest intermediate market value between the time of the conversion and a reasonable time after notice thereof within which to replace them, and not their highest value between the time of the conversion and the time of trial.

STOCKS—CONVERSION—REMEDY.—When stocks pledged as collateral for the payment of a note are sold by the pledgee before maturity of the debt,

the pledgor may either ratify the sale and claim the proceeds, treat the sale as a conversion, and require the pledgee to replace the stock, replace it himself, and charge the pledgee for the loss, or recover the advance in the market price up to a reasonable time within which to replace after notice of the sale, or he may hold the pledgee for a breach of his duty to keep the security until the maturity of the debt, and recover as damages the value of the security at that time.

STOCKS—CONVERSION—RATIFICATION.—When stocks pledged as collateral for the payment of a note are sold by the pledgee without authority before the maturity of the debt, and the pledgor fails to repudiate the sale or treat it as a conversion, and credits the proceeds as a payment on the note, his act is an irrevocable ratification and adoption of the sale.

SUIT on a note secured by a pledge of stocks and bonds as collateral security.

Bradbury C. Chetwood, for the plaintiff in error.

E. A. and W. T. Day, for the defendants in error.

299 **DEPUE, J.** The note on which this suit was brought was, in terms, made payable in four months after date. It became due August 15, 1884. This suit was brought May 21, 1891. The suit was in all respects regular, and its regularity was in no wise dependent upon that paragraph in the pledge of securities which, upon certain conditions, accelerated the maturity of the note, and made the money payable at a time earlier than that named on its face.

The securities pledged for the payment of the note were sold by the plaintiff on the 15th of May, 1884, as the note matured in the following August. From the sale the sum of \$45,456.26 was realized, leaving a balance due on the note of \$4,456.25, for which the plaintiff claimed judgment. The defendants' contention was, that the sale in May was unauthorized, and amounted in law to a conversion. In all other respects the sale was in conformity with the power. On the theory that the sale at the time in question was unauthorized, the defendants contended that they were entitled to have the value of the securities allowed to them at their highest market price between the conversion and the time of the trial. The defendants gave in evidence the fact that in December, 1886, and April and May, 1887, these securities were worth in the market the sum of \$56,860—sufficient to pay the plaintiff's note and leave a balance of \$6,860 due the defendants.

The defendants' claim was disallowed, and judgment given for the plaintiff for the sum of \$4,456.26, being the balance

due on the note after crediting on it the proceeds of sale, with interest.

The case was tried by the judge, a jury being waived. A general exception was taken to his finding. Upon such an exception, if there be evidence to sustain the finding, the exception will not be sustained.

³⁰⁰ The plaintiff is a national bank, located in the city of New York. The defendants, at the time of these transactions, were bankers and brokers in New York. The debt for which the note was given was a loan of \$50,000 to the defendants. The form of the contract pledging securities for the repayment of loans is such as is usual in that city. It must be assumed that the parties were aware of the effect of the terms of such contracts, and with the course of dealing in that market with securities pledged as security for loans.

By the first paragraph in the defendants' contract the plaintiff was authorized to sell the securities at any broker's board in the city of New York, or at public or private sale in said city, or elsewhere, at its option, on the nonperformance of any of the defendants' promises therein contained, without any notice of the time and place of sale. This contract was embodied in, and made part of, the note itself, and the promise to pay in the note was one of the promises on the nonpayment of which a sale was authorized. The sale was made through a firm of brokers, who were members of the stock exchange in New York city. There is no foundation in the evidence for complaint of the manner or fairness with which the sale was conducted.

The power of the plaintiff to sell the securities before the four months named in the note had expired depends upon the construction and effect of the second paragraph of the contract. There was some discussion on the argument as to the right to fill the blanks in that paragraph. The evidence was not sufficient to justify the court in filling the blanks. The contract will be construed in the condition it was in when it was delivered to the plaintiff. In this paragraph it is provided that in case of a depreciation in the market value of the property pledged, the defendants should, on demand by the holder of the note, make a payment thereon, so that the market value of the securities should always be more than the amount of the debt; and that in case of the failure of the defendants to make such payment the note should, at the ³⁰¹ payee's option, become due forthwith, and that the plain-

tiff might immediately reimburse itself by the sale of the property, or any part thereof; and that in case the net proceeds of such sale should be less than the amount then due on the note, the defendants should forthwith, after such sale, pay the amount of such deficiency, with interest.

The power to sell the securities before the maturity of the note, according to its terms, was made to depend upon the concurrence of two conditions: the depreciation in the market value of the property pledged and the failure of the defendants, after demand, to make a payment on account of the loan, so that the market value of the securities pledged should be more than the amount due on the note.

The proof was that on the 6th of May, 1884, the firm of Grant, Ward & Co. failed, and the Marine Bank closed its doors. On the 14th the Metropolitan Bank closed its doors, and a number of leading bankers failed. These failures created a panic in the money market, and a great depreciation in the market value of all commercial securities. Early on the morning of the 15th the defendants' embarrassments led them to an assignment for the benefit of their creditors. It fully appeared that at the commencement of business hours on the morning of May 15th the securities pledged had so depreciated that their market value was considerably below the amount of the plaintiff's debt. Under a pledge with a power of sale such as exists in this case the pledgee, unless restrained by other conditions in the contract of pledge, has a right to sell whenever the condition of the market makes it prudent for him to do so for the protection of his interests.

The other condition was that a demand should be made upon the defendants, and that upon such demand the defendants should pay on account of the note a sum sufficient to reduce the amount due below the market value of the securities then had. The case shows that at the beginning of business hours on the morning of the 15th two notices were served on the defendants. One of these notices was in a form, signed by the cashier of the bank, in these words: "I hereby call ³⁰² your loan of April 15, 1884, for \$50,000." This notice was plainly not a demand in conformity with the condition expressed in the contract. A depreciation in the market value of the securities pledged did not convert the loan, which was made on four months' time, into a call loan. That condition of affairs imposed upon the defendant the obligation

not to pay the note in full, but by a payment upon it to reduce the loan until the amount remaining due was under the market value of the securities. It appeared in evidence that the other notice served was "a demand for the payment on account of the loan to a degree corresponding to the depreciation of the securities." Neither the original notice nor a copy was produced. The witness who testified upon this subject was not able to state the amount of the depreciation, but he added that such depreciation was known to both the borrower and lender.

The object of a demand in a contract of this sort is to give the party an opportunity to comply with the terms of his contract and preserve his securities from sale before the expiration of the time for which the loan was negotiated; and it would be reasonable that in making the demand the party, before he is put in default, should have been made aware of the extent of the depreciation, approximately at least, and the sum required to be paid to save his rights should be specified. If the case rested solely on the sufficiency of the demand made I should have some hesitation in sustaining this judgment.

Assuming that the sale of the securities in May was unauthorized, it was a conversion of the property, though the sale was made in good faith. Nevertheless, the judge's finding and the rule of damages applied were correct.

The general rule is, that the measure of damages for conversion is the value of the property at the time of the conversion. This rule has been modified with respect to the conversion of stocks and bonds, commercial securities vendible in the market, the market value of which is liable to frequent ³⁰³ and great fluctuations caused by the depression and inflation of prices in the market.

In *Markham v. Jaudon*, 41 N. Y. 235, the court of appeals held that as between a customer and his broker, holding stock purchased for the former, which had been pledged as security for advances made in the purchase, the measure of damages for the conversion by an unauthorized sale was the highest market price between the time of the conversion and the trial. Relying upon this case, the defendants put in evidence no proof of value except the market value in December, 1886, and April and May, 1887. But *Markham v. Jaudon*, 41 N. Y. 235, has been overruled by a series of cases in the New York courts, and the rule adopted that in such cases the principal

may disaffirm the sale, and that the advance in the market price from the time of sale up to a reasonable time to replace it, after notice of the sale, was the proper measure of damages: *Baker v. Drake*, 53 N. Y. 211; 13 Am. Rep. 507; 66 N. Y. 518; 23 Am. Rep. 80; *Gruman v. Smith*, 81 N. Y. 25; *Colt v. Owens*, 90 N. Y. 368. These decisions were made in cases where the transactions were dealings between the customer and broker in the purchase and sale of stocks on a margin. Subsequently, the same rule was applied where the owner of stock, for which he had paid full value, and which he held as an investment, put it in the hands of a broker as collateral security for the debt of a third person, upon condition that it should not be sold for six months, the stock having been sold without the owner's authority before the expiration of that time. Under the decisions of the New York courts reasonable time, where the facts are undisputed, is a question of law for the court: *Wright v. Bank of Metropolis*, 110 N. Y. 237; 6 Am. St. Rep. 356. In *Colt v. Owens*, 90 N. Y. 368, thirty days after the sale and notice of it was regarded as reasonable time. The rule of the highest intermediate value between the time of the conversion and the time of the trial has been rejected in the supreme court of the United States as the proper measure of damages, and the rule that the highest intermediate value between the time of the conversion and a reasonable time after the owner has received notice of it was adopted ³⁰⁴ as the correct view of the law, for the reason, as expressed by Mr. Justice Bradley, that more transactions of this kind arise in the state of New York than in all other parts of the country, and that the New York rule, as finally settled by its court of appeals, has the most reason in its favor: *Galigher v. Jones*, 129 U. S. 193.

The principle upon which this doctrine rests is the consideration that the general rule that, in an action for a conversion, the market value of the property at the time of the conversion would afford an inadequate remedy, or rather no remedy at all, for the real injury, which consisted in the wrongful sale of property of a fluctuating value at an unfavorable time, chosen by the broker himself. Hence, the cost of replacing the securities by a purchase in the market, allowing a reasonable time for that purpose, has been regarded as the proper measure of damages. As was said by Mr. Justice Bradley in *Galigher v. Jones*, 129 U. S. 193: "A reasonable time after the wrongful act complained of is to be allowed to

the party injured to place himself in the position he would have been in had not his rights been invaded." The general rule that the market value at the time of the conversion is the measure of damages being found to be impracticable in these cases, and having been abandoned, the effort has been to obtain some rule by which substantial justice, as near as may be, may be attained. In England the market value at the time of the trial appears to be the measure of damages: *Owen v. Routh*, 14 Com. B. 327. In some of the sister states the rule of the highest intermediate price before the trial has been adopted. In New York, and in most of the sister states, as well as in the supreme court of the United States, the formula which has been called the New York rule, has been adopted, and is the rule which will accomplish the most complete justice in the ordinary transactions between the broker and his customer dealing in stocks when an unauthorized sale is the act of conversion. In such cases the customer has a choice of remedies. He may claim the benefit of the sale and take the proceeds; he may require the broker to ³⁰⁵ replace the stock, or replace it himself, and charge the broker for the loss, or he may recover the advance in the market price up to a reasonable time within which to replace it after notice of the sale: Cook on Stocks and Stockholders, sec. 460. But where stocks and negotiable securities are pledged as collateral security for the payment of a debt to become due and payable on a future day another element enters into the consideration of the compensation to be awarded to the owner of the securities for the unauthorized sale of them before the debt matures. Upon such a bailment, it is the duty of the pledgee to keep the securities in hand at all times, ready to be delivered to the pledgor on the payment of the debt: Cook on Stocks and Stockholders, secs. 469, 471. An unauthorized sale before the debt matures is a conversion for which the pledgor may have remedy in the manner above mentioned. But the sale may be made when the market value is depreciated and the market with a downward tendency; the market may revive, and prices be enhanced, before the debt matures. Under such circumstances a rule that the pledgor shall be at liberty to elect to treat the unauthorized sale as a conversion, or to hold the pledgee for the breach of his duty to keep the securities until the maturity of the debt, and recover as damages the market value of the securities as of that time, would commend itself

in reason and justice. As applied to the facts of this case this rule would be eminently just. The plaintiff in good faith sold the securities in the manner authorized by the contract of pledge; the breach of duty was in selling at an unauthorized time. The debt was not paid or tendered at maturity, and if the plaintiff had held the stock, and sold it at that time, the sale would have been strictly in conformity with the power. If the defendants lost any thing by the sale at a time unauthorized they would be recompensed for that loss by an award of damages equivalent to the market value of the securities at the time the debt became due. Tested by either of these standards the proper credit was allowed, the proof being that the prices of the securities were less when the note matured than when the ³⁰⁶ securities were sold. No evidence of an increased price prior to December, 1886, was produced.

The finding of the judge should be affirmed on the ground, also, that the sale was consented to, and ratified, by the defendants.

The notices served on the morning of May 15th informed the defendants that the securities pledged had, in the plaintiff's estimation, depreciated in market value, and that the contingency provided for in this part of the contract had happened, and also plainly indicated the purpose, on the part of the plaintiff, to avail itself of the right which, under those circumstances, would accrue under the contract. Immediately after the sale was made, the defendants had notice of the fact of sale, and, very shortly after, of the amount realized therefrom. No objection was made to the sale or the amount realized. On June 4, 1884, the defendants filed a schedule of their indebtedness under their assignment. This schedule was verified by the oaths of the defendants that it contained a true account of their creditors, and of the sum owing to each, and also a statement of any existing collateral or other security for the payment of such debt. In this statement the plaintiff was put down as a creditor for the sum of \$4,737.50, which was about the amount due the plaintiff after the proceeds were applied to the debt; and to this specification of the existing debt due the plaintiff was appended a statement that for the payment of this debt there was no existing collateral or other security. In September, 1885, the defendants caused to be presented to the plaintiff a composition agreement, with a view to a compromise with their creditors,

in which the debt due the plaintiff was stated to be the sum of \$5,118.87, figures which represented approximately the net amount due the plaintiff on the note after applying thereon the proceeds of the sale of the securities, with interest. This agreement was signed by the plaintiff; but the project fell through, the defendants being unable to effect a compromise with all their creditors.

The defendants had the election either to ratify the sale, ³⁰⁷ and claim the benefit of it, or repudiate it, and hold the plaintiff in damages. The act of the defendants in applying the proceeds of the sale as a credit on the plaintiff's note is so positive and emphatic an act of ratification and adoption that it cannot be retracted.

The case was properly decided at the trial, and the judgment should be affirmed.

TROVER—CONVERSION—MEASURE OF DAMAGES.—If there is a wrongful conversion of stock by a pledgee, the proper measure of damages therefor is the value of the stock at the time of the conversion, with interest thereon from such time: *Moody v. Whitney*, 38 Me. 174; 61 Am. Dec. 239, and note; *Robinson v. Hurley*, 11 Iowa, 410; 79 Am. Dec. 497; *White v. Martin*, 1 Port. 215; 26 Am. Dec. 365, and note; *Clark v. Whitaker*, 19 Conn. 319; 48 Am. Dec. 160, and note; *Lee v. Mathews*, 10 Ala. 682; 44 Am. Dec. 498, and note; *Woods v. Gaar*, 93 Mich. 143; *Ganong v. Green*, 71 Mich. 1; *Stilhoell v. Farewell*, 64 Vt. 286. But the jury may in their discretion give the highest value of the stock at any time between the conversion and the trial: *Terry v. Birmingham Nat. Bank*, 93 Ala. 599; 30 Am. St. Rep. 87, and note; *Pickert v. Rugg*, 1 N. Dak. 230. See, also, the extended notes to *Baker v. Wheeler*, 24 Am. Dec. 70; *Woolley v. Carter*, 11 Am. Dec. 526, and *Griggs v. Day*, 32 Am. St. Rep. 725.

COLLATERAL SECURITY—CONVERSION BY PLEDGEE—REMEDIES OF PLEDGOR. For a full discussion of this question see the extended notes to *Griggs v. Day*, 32 Am. St. Rep. 724, and *Balling v. Kirby*, 24 Am. St. Rep. 797.

COLLATERAL SECURITY—UNAUTHORIZED SALE BY HOLDER.—RATIFICATION BY PLEDGOR: See the extended note to *Griggs v. Day*, 32 Am. St. Rep. 731.

SULLIVAN v. CLIFTON.

[55 NEW JERSEY LAW, 324.]

LIEN OF LIVERYMAN.—A chattel mortgage on a horse is superior to a statutory lien of a livery-stable keeper for his board and keeping furnished at the request of the owner after the execution of the mortgage.

LIENS—COMMON LAW AND STATUTORY.—Common-law liens as distinguished from contract or statutory liens attach to the property without reference to ownership, and override all other rights in the property, while the latter liens are subordinate to all prior existing rights therein.

Harrison H. Voorhees, for the plaintiff in error.

John W. Wartman, for the defendant in error.

324 VAN SYCKEL, J. On the 2d of October, 1891, one Amos Wells executed to Sullivan, the plaintiff, a chattel mortgage on a horse owned by Wells. The mortgage was immediately placed on record, the mortgagor retaining possession of the horse.

After the mortgage had been lodged for record, the mortgagor, without the knowledge of Sullivan, left the horse at the livery-stable of the defendant, Clifton, to be boarded and kept.

The only question in the case is, whether the lien of the chattel mortgage is superior to the statutory lien of the livery-stable keeper.

Our statute reads as follows: "That all livery-stable, boarding, and exchange stable keepers shall have a lien on all horses and other animals left with them in livery, for board or sale, or exchange; and also upon all carriages, wagons, sleighs, and harness left with them for storage, sale, or exchange, for the amount of the bill due to the proprietor of **325** any such stable for the board and keep of any such horse or other animal, and also for such storage; and shall have the right, without the process of law, to retain the same until the amount of such said indebtedness is discharged."

The courts of Tennessee, New Hampshire, Vermont, and Massachusetts hold that the mortgagee is entitled to priority: *McGhee v. Edwards*, 87 Tenn. 507; *Sargent v. Usher*, 55 N. H. 287; 20 Am. Rep. 208; *Ingalls v. Vance*, 61 Vt. 582; *Howes v. Newcomb*, 146 Mass. 76.

I have found but two cases holding otherwise: *Smith v. Stevens*, 36 Minn. 303; *Case v. Allen*, 21 Kan. 217; 30 Am. Rep. 425.

In the former case the statute gave the liveryman a lien for keep of horses, at the request either of the owner or lawful possessor thereof, and provided that he might retain the animals until his charges were paid.

Under that statute, no other view could reasonably be taken.

In the Kansas case Justice Brewer, in support of his view giving preference to the statutory liens, cites the English cases giving a lien for the repairs of vessels made at the instance of the mortgagor priority over a previous mortgage executed by him. This preference rests not upon statute but upon a rule of the commercial law which does not dominate this case.

The English courts base the superior right of one who repairs a vessel upon this ground, viz., that the mortgagee having allowed the mortgagor to continue in the apparent full ownership of the vessel, there arises an implication that the mortgagee has authorized him to make repairs which give an additional value to the vessel, and keep it in an efficient condition for service: *Williams v. Allsup*, 10 Com. B., N. S., 417.

They hold, however, that the case of an agistment does not fall within the same principle, inasmuch as the agister does not confer any additional value on the animal—he simply takes the animal to feed it: *Jackson v. Cummins*, 5 Mees. & W. 342; *Wallace v. Woodgate*, 1 Car. & P. 575.

³²⁶ The cases are cited and discussed by Mr. Justice Depue in *White v. Smith*, 44 N. J. L. 105, 43 Am. Rep. 347, and this distinction is adverted to in that case.

Hence it was that the agister of cattle, not being within the reason of the rule upon which the lien for the repairs of vessels was based, was not entitled at common law to the like protection.

Nor is the liveryman within the reason of the rule which applies to innkeepers.

An innkeeper is bound to entertain his guest, but even he, at common law, acquires no lien on the goods which his guest brings with him if he knows that the guest is unlawfully in possession of them.

A liveryman is not bound to receive a horse on keep. In this case he had notice of the mortgage, and could have declined to take the horse, unless he was willing that his lien under the statute should be subject to the mortgage. The lien

of the liveryman, as well as that of the mortgage, resting exclusively upon statutory provisions, the one having no higher claim to be enforced than the other, the lien of the former being subsequent in time, and taken with full notice of the right of the latter, must, upon principle, be subject to it. The maxim, *prior est in tempore, potior est in jure*, applies.

It is one of the characteristics of common-law liens which arise, upon considerations of justice and policy, by operation of law, as distinguished from liens created by contract or statute, that the former, as a general rule, attach to the property itself, without any reference to ownership, and override all other rights in the property, while the latter are subordinate to all prior existing rights therein.

In my opinion the mortgage must prevail over the contesting lien, and the judgment below should be reversed.

LIEN OF AGISTER—PRIORITY BETWEEN AND CHATTEL MORTGAGE.—An agister's lien, created by statute, is paramount to the lien of a prior chattel mortgage upon the same cattle: *Case v. Allen*, 21 Kan. 217; 30 Am. Rep. 425. The doctrine of the principal case, which is the contrary doctrine to that of the above case, is maintained by *Sargent v. Usher*, 55 N. H. 287; 20 Am. Rep. 208; and *Easter v. Goyne*, 51 Ark. 222.

PENNSYLVANIA RAILROAD COMPANY v. PARRY.

[100 NEW JERSEY LAW, 551.]

RAILROADS—LIMITATION ON RIGHTS OF PASSENGER.—A person who purchases a railway ticket to a certain place, and takes his seat in a particular train that goes to his destination, cannot, if the ticket specifies that it is "not good to stop off en route," without permission of the railway company, while the train is reasonably pursuing the duty of the carrier, leave it and take another train and complete his journey under the same contract. His contract is entire, and neither he nor the company can be required to perform it in fragments.

RAILROADS—TICKETS—REGULATIONS.—A railway ticket is a mere token that fare has been paid, and that the passenger has the right to be carried to the destination it indicates according to the reasonable regulations of the company. Such regulations, at least so far as they are known to the passenger, enter into the contract of carriage, and it is his duty to conform to them. Such ticket need not fully set out the contract of carriage.

ACTION to recover damages for being wrongfully ejected from a railway train. The plaintiff, Parry, purchased an excursion ticket from Riverton to Mount Holly. The former place is on the main line of the Pennsylvania Railroad Com-

pany, and the latter upon a branch line known as the Burlington Branch. The ticket sold to plaintiff indicated that his route was to be "via Burlington Branch," and that such ticket was "not good to stop off en route." By the regulations of the defendant company passengers holding such tickets were required, in going from Riverton to Mount Holly, and in returning therefrom, to change cars at its Broad Street station in the city of Burlington. The plaintiff on his return took a train that, according to the company's regulations, should connect at Broad street with a train which would leave Trenton at twenty minutes past five o'clock, P. M., and such connection required passengers to wait at the Broad Street station a half hour or more until the train from Trenton arrived. With the view of saving a half hour's delay in waiting for the proper connecting train the plaintiff got off his train, and walking to the station reached it in time to catch another train which happened to be there, and which would reach and stop at his place of destination at an earlier time than the train upon which he was traveling. Upon presenting his excursion ticket on the latter train he was informed that it was good only upon the train which he had left. He refused to pay his fare, and was ejected from the train. The defendant moved for a nonsuit, and such motion being denied, its denial was assigned as error.

Samuel H. Grey, for the plaintiff in error.

Samuel K. Robbins and John W. Wescott, for the defendants in error.

553 The CHANCELLOR. The motion to nonsuit presented to the court below this question, whether the contract between Mr. Parry and the railroad company permitted Mr. Parry to quit the branch road train before it reached its destination, and, proceeding in advance of it, continue his journey in a train with which it did not connect, and was made available to him only by accidental delay.

It is established by the course of judicial decision that when a person who purchases a railway ticket to a certain place takes his seat in a particular train that goes to his destination he cannot, without permission of the railway company, while the train is reasonably pursuing the duty of the carrier, leave it and take another train, and complete his journey under the same contract. The reason is that his contract is entire, and neither he nor the company can be

required to perform it in fragments: *State v. Overton*, 24 N. J. L. 435; 61 Am. Dec. 671; *Petrie v. Pennsylvania R. R. Co.*, 42 N. J. L. 449; *Cheney v. Boston etc. R. R. Co.*, 11 Met. 121; 45 Am. Dec. 190; *Dietrich v. Pennsylvania R. R. Co.*, 71 Pa. St. 432; 10 Am. Rep. 711; *Oil Creek etc. Ry. Co. v. Clark*, 72 Pa. St. 231; *Vankirk v. Pennsylvania R. R. Co.*, 76 Pa. St. 73; 18 Am. Rep. 404; *Hamilton v. New York Cent. R. R. Co.*, 51 N. Y. 100; *Wyman v. Northern Pac. R. R. Co.*, 34 Minn. 210; *McClure v. Philadelphia etc. R. R. Co.*, 34 Md. 532; 6 Am. Rep. 345; *Stone v. Chicago etc. Ry. Co.*, 47 Iowa, 82; 29 Am. Rep. 458; *Churchill v. Chicago etc. R. R. Co.*, 67 Ill. 390; 554 *Cleveland etc. R. R. Co. v. Bartram*, 11 Ohio St. 457; *Hatten v. Railroad Co.*, 39 Ohio St. 375; *Wilsey v. Louisville etc. R. R. Co.*, 83 Ky. 511.

It is not necessary that the contract of carriage should be fully set out in the passenger's ticket. The ticket is a mere token that the fare has been paid, and that the passenger has the right to be carried to the destination it indicates, according to the reasonable regulations of the railway company. Such regulations, at least so far as they are known to the passenger, enter into the contract of passage, and it is the duty of the passenger to conform to them.

The proofs of the plaintiff below very clearly exhibited that Mr. Parry was familiar with the regulations under which the defendant company was accustomed to transport passengers between Riverton and Mount Holly upon such tickets as the one he purchased. He admits that he knew that the local accommodation train was apt to be belated, and that the train upon the branch road did not connect with it, and hence that the latter train would not continue to the Broad Street station in Burlington until the former had passed, and that it was possible occasionally to catch it by quitting the branch road train while it was waiting upon the Y, and walking a half mile to the Broad Street depot. Indeed, it was his accurate knowledge of the regulations of the company, and the delay they occasioned, that prompted him to disregard them when he saw an opportunity to expedite his transit.

He states that he could have purchased an excursion ticket from Riverton to Burlington and back, and another from Burlington to Mount Holly and return, for the same price that he paid for the single excursion ticket from Riverton to Mount Holly and return, and in that way have secured the undoubted right to return by the local accommodation if he could have

caught it. But he did not purchase the two excursion tickets and make his contract in that way. He chose rather to buy the single ticket, which expressly provided that he should be transported between the terminal points of his journey "via Burlington Branch," and subjected him to the ⁵⁵⁵ regulations that he should be carried to the Broad Street station, and there change to the cars of a connecting train.

Under authority of the rule referred to, even in absence of the express notice upon his ticket that he should not "stop off en route" after he had once started in a train, it may be questionable whether it would not have been an abandonment of his contract if he had left the train, while it was duly performing its duty, at any other point than that which the regulations designated for that purpose. The notice upon the ticket simply served to call attention to that rule. But in deciding this case it is not necessary to determine that question. The additional fact that, with the express notice which the ticket gave before him, he quit the branch train with the deliberate intention of not again taking either it or its connecting train, appears, and in light of such fact his nonconformity to the regulations which entered into his contract, and consequent infraction of that contract and abandonment of his rights thereunder, become too conspicuous to admit of doubt.

There was nothing in the evidence to indicate that the regulations of the defendant company were not reasonable, and it is admitted that the train abandoned was pursuing its way as those regulations required.

Under these conditions the conductor was justified in demanding a new fare, and, upon the refusal of Mr. Parry to pay it, to remove him from the train in the manner that was adopted: *State v. Overton*, 24 N. J. L. 435; 61 Am. Dec. 671.

It is our conclusion that the plaintiff below should have been nonsuited, and hence that the judgment now reviewed must be reversed.

JUSTICES MAGIE, ABBETT, BROWN, and KRUEGER dissented on the ground that as the ticket in question contained no condition that the passenger should take a continuous train, nor that he should take a connecting train, and as there was no train of either description, strictly speaking, he did not forfeit his right to be carried on such ticket, on any train of the company passing his destination, unless his alighting from one train and walking a short distance to a station, and there boarding another train, could be considered as a stopping off en route. This depended on his intent to break the continuity of his journey, and was properly left to the jury to determine.

RAILROADS—TICKETS—CONTINUOUS PASSAGE.—The rule of a railway company that a passenger must go through on the same train is reasonable, and forms part of the contract upon the purchase of a ticket, although it may be unknown to the passenger: *Cheney v. Boston etc. R. R. Co.*, 11 Met. 121; 45 Am. Dec. 190, and extended note. If a passenger leaves the train before reaching his destination he forfeits all rights under his contract, and cannot resume his journey on a different train by virtue of the check given to him by the conductor of the original train: *State v. Overton*, 24 N. J. L. 435; 61 Am. Dec. 671, and note; *McClure v. Philadelphia etc. R. R. Co.*, 34 Md. 532; 6 Am. Rep. 345. This question will be found thoroughly discussed in the extended notes to the following cases: *Kansas City etc. R. R. Co. v. Rodebaugh*, 5 Am. St. Rep. 727, and *Commonwealth v. Power*, 41 Am. Dec. 479; also the notes to *Boston etc. R. R. Co. v. Proctor*, 79 Am. Dec. 730; *Keeley v. Boston etc. R. R. Co.*, 24 Am. Rep. 23; and *Dietrich v. Pennsylvania R. R. Co.*, 10 Am. Rep. 718.

RAILROADS—TICKETS—REGULATIONS.—The purchaser of a railroad ticket is entitled, in the absence of express stipulations, to be carried to his destination in a reasonable time and manner, agreeably to the reasonable rules and regulations of the company: *Johnson v. Concord R. R. Corp.*, 46 N. H. 213; 38 Am. Dec. 199, and note. Purchasers of tickets are bound to comply with all reasonable rules and orders of the railroad company or their agents: *Warren v. Fitchburg etc. R. R. Co.*, 8 Allen, 227; 85 Am. Dec. 700. For a discussion of passage tickets, their nature, and legal operation, see *Quimby v. Vanderbilt*, 17 N. Y. 306; 72 Am. Dec. 469, and note; and the extended note to *Kansas City etc. R. R. Co. v. Rodebaugh*, 5 Am. St. Rep. 723.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA

**ARTHURHOLT v. SUSQUEHANNA MUTUAL FIRE
INSURANCE COMPANY.**

[159 PENNSYLVANIA STATE, 1.]

INSURANCE—AGENT—WHAT CONSTITUTES.—An insurer, who delivers a policy to an insurance broker on the understanding that he is to deliver it to the insured, collect the premium, retain his percentage, and remit the balance to the insurer, makes the broker his agent in fact for that transaction, and the receipt of the premium by such agent is the receipt by the insurer.

INSURANCE—WAIVER OF CONDITION.—A provision in a policy of insurance stipulating that the policy shall be void unless payment of the premium shall be made to the secretary, or an agent of the insurer duly appointed as such in writing, is intended to protect the insurer against default on the part of mere solicitors for insurance from the insured, but not to make the latter answerable for the default of the insurer's agents; and if the insurer, either expressly or by acts warranting the implication, in fact appoints an agent to deliver a policy and collect the premium, the receipt of the money by such agent is the receipt by the insurer, and operates as a waiver of such condition in the policy, although the insurer does not in fact receive the premium.

INSURANCE—WAIVER OF CONDITION.—A clause in a policy of insurance providing that the policy shall be void unless the premium is paid to the secretary, or an agent of the insurer duly appointed as such in writing, is waived by the insurer whenever, by his voluntary act, the policy leaves his office to be delivered to the insured on payment of the premium, without regard to the fact that some one, having no nominal connection with the insurer as agent, hands over the policy, receives the premium, and fails to pay it to the insurer.

S. H. Miller, Q. A. Gordon, and J. C. Miller, for the appellant.

E. P. Gillespie and B. Magoffin, for the appellee.

⁴ **DEAN, J.** Arthurholt, the plaintiff, was a retail merchant in Clarksville, Mercer county; he owned the building con-

taining his stock of goods; in January, 1892, he applied to McKean, an insurance agent in Mercer, Pennsylvania, for insurance on the building ⁵ and goods; McKean could not place the risk in any of the companies he was agent for, so he applied to Downing, an insurance broker in Philadelphia, to get the insurance; Downing applied by letter to the Susquehanna Mutual Fire Insurance Company, this defendant, having its office at Harrisburg, to take a risk of one thousand dollars on the goods and three hundred dollars on the building; the defendant, in response, on the 13th of January, 1892, made out the policy, and transmitted it by mail to Downing at Philadelphia, who immediately sent it by mail to McKean at Mercer, who by mail delivered it on January 27th to Arthurholt, the plaintiff, at Clarksville; the next day Arthurholt forwarded by check the premium, nineteen dollars and fifty cents, to McKean, who duly received it, and drew the money from the bank, but he did not pay it over to either Downing or the insurance company. On the 3d of March, 1892, both goods and building were destroyed by fire.

The defendant refused to pay any part of the loss, because: 1. The premium was not actually paid to the company, as required by the term of the policy; 2. There were fireworks in the building at the date of the insurance, and this, by a stipulation in the policy, rendered it void; 3. There was other insurance, making in the aggregate more than two-thirds the value of the property, and this avoided the policy.

Under the instructions of the court on the evidence there was a verdict for plaintiff; hence this appeal.

It is very clear the court was right in submitting the conflicting evidence on the questions of fact raised by the second and third objections of defendant to the determination of the jury; but as counsel for appellant has not pressed the assignments of error to the instruction in these particulars they may be dismissed.

As to the first objection, which is embraced in the first assignment of error, it is earnestly argued, that, on the undisputed facts, the court should have directed a verdict for defendant. The stipulation in the policy which, it is urged, must defeat a recovery, is as follows: "If the premium for this policy, or for any renewal of the same, shall not be paid to the secretary, or an agent of the company duly appointed as such in writing, within fifteen days from the date of its issue" then the policy shall be void. It will be noticed, the

premium money was paid to McKean, who was neither the secretary nor an ⁶ agent of the company duly appointed by writing; he had no official connection whatever with the company. But the company's formally attested policy came into his hands for delivery to the insured. Why? Because it was sent to him by Downing for that purpose; he was, then, the mere representative of Downing, the vehicle chosen by him for the transmission of the policy, and the reception and remittance of the premium; this appears from the testimony of both Downing and McKean. Downing's agency was not by a formal written appointment; defendant denies that he was its agent at all. He testified he had been an insurance broker, with an office in Philadelphia for fifteen years; that he had placed a number of risks with defendant company before he applied for this policy; always collected the premiums, and remitted them, less his commissions, to the company; that on his application the company sent him this policy, and he sent it to McKean to deliver to the insured, and collect and remit the premium to him. For negotiating and placing these risks the company allowed him, Downing, a commission of twenty per cent of the premium, he remitting to the company eighty per cent. He did not deny his liability to the company for the premium. If the company delivered this policy to Downing, on the understanding that he was to deliver it to the insured, collect the premium, retain his percentage, and remit the balance to the company, certainly, whatever may have been his attitude before that time while negotiations were pending, he was the agent in fact of the company for the delivery of the policy and the collection of the premium; as fully the agent of the company as if the secretary had handed him the policy in the company's office, with instructions to deliver it to the insured next door and collect the premium.

Downing does not deny that McKean merely represented him in the delivery of the policy and the collection of the money; the payment to McKean was, in its legal effect, a payment to Downing.

Taking, then, the provision in the policy as it stands, that payment shall be made only to the secretary or to an agent duly appointed as such in writing, it is clear no act of the insured, or no act of one assuming to be an agent, and who is really not an agent of the company for the collection of the premium, will protect the assured against the failure of

the ⁷ money to reach the company. But if the company itself, either expressly or by acts which warrant the implication, has in fact appointed an agent to deliver a policy and collect the premium, the receipt of the money by such agent is the receipt by the company. To hold otherwise would be a fraud upon the policy holder. He runs the risk of the honesty of his own agents, who apply to the company for insurance upon his property, and the risk of the authority to collect in the man to whom he pays, but he does not guarantee the company that its own agents, sent by it to deliver his policy and receive his money, will pay it over to them. The intention in inserting this provision doubtless was to protect the company against default on the part of those who were mere solicitors of insurance for the insured, but it was not intended to make the insured answerable for the default of the company's own agents; nor will any perversion of the manifest purpose of the stipulation be permitted to work such a result.

The court properly submitted the evidence to the jury to find whether McKean was the mere messenger or servant of Downing, and the payment to him a payment really to Downing; then, further, from the evidence that Downing had for years at times acted for the company, it issuing policies at his request, he collecting the premiums for twenty per cent commission, and paying the net balance to the company, whether the company had, without writing, in fact appointed him its agent to deliver this policy and receive the premium; if so, the payment to Downing was a payment to the company, and the policy could not be avoided merely because the money had not been physically lodged in the company's treasury.

The cases cited by appellant as holding a different rule are without doubt the law, but they are clearly distinguishable on their facts from the one before us. In *Pottsville Mutual Fire Ins. Co. v. Minnequa Springs Imp. Co.*, 100 Pa. St. 137, there were three different brokers between Haeseler, the agent of the company, and the insured; the policy was delivered to the insured, who paid the premium, but the money was remitted no further than the second broker; there was no pretense that it had reached the agent of the company authorized to deliver the policy and collect the premium. Our brother Green puts the decision expressly on the ground that the insured had paid the ⁸ premium to a broker he knew was

not the agent of the company, and therefore took the risk. If, in that case, Haeseler, the agent of the company, had sent an errand boy with the policy to the assured to deliver it and bring back the premium, the policy would have been enforced even though the errand boy had lost the money or embezzled it. So in the other cases cited there was no actual payment of the premium to an agent authorized by the company to receive it. Here the jury has found, on competent evidence, there was such payment to such agent.

While this case is clearly distinguishable in its facts from those cited, and for this reason is not ruled by the principles announced in them, yet if the results contended for here by appellant necessarily follow from the construction placed upon such stipulations then must follow some qualification of the rule laid down in them. Otherwise the rulings in *Marland v. Royal Ins. Co.*, 71 Pa. St. 393, followed by *Greene v. Lycoming etc. Ins. Co.*, 91 Pa. St. 387, and *Pottsville etc. Ins. Co. v. Minnequa Springs Imp. Co.*, 100 Pa. St. 137, may not seldom lead to injustice. The law, in those cases, may be invoked by dishonest insurance companies to escape payment of what ought to be held a clear legal obligation, and attempts will be made under them to pervert the clause referred to into a mere trap for unwary but honest insurers. Take the case in hand: The owner of property, on the 27th of January, receives a policy dated the 13th of same month, regularly attested, issued by the company, insuring property to the value of thirteen hundred dollars against fire, for one year from its date; he pays the premium to the person handing him the policy, assuming, as a business man naturally would, that the company having intrusted the executed policy for delivery to the man who offers it to him the same man has authority to receive the money; then, resting on the security inspired by the possession of the company's executed contract, and his payment of the consideration demanded, he makes no further inquiry; seven weeks after the date of the policy, when nearly one-seventh of the term covered by the insurance has expired, his property is destroyed, and he is met by a refusal to pay on the ground that the premium paid had not reached the company's treasury. All this time he has had possession of the policy with no notice from the company that the premium * had not been handed over; yet during the same time the risk must have been carried on the books of the company as a valid outstanding risk; that is, if the company kept any

books showing the condition of its business and the extent of its liabilities. We assume the policy was not canceled for nonpayment of the premium, for no notice of default was given the assured, and the secretary of the company, who was familiar with the books, and who testified at length, does not say that it was canceled.

Under such a state of facts, and applying to them the law invoked in the cases cited, unless the policy holder, as in this case, can further adduce evidence that he to whom he paid his money was in fact authorized to receive it, he is insured if there be no fire, but not insured if one occur; for if, without notice to him of the nonreceipt of the premium on an executed and delivered policy, the company can declare it void when a fire occurs seven weeks after it has been paid for it can do the same seven months after. In effect the policy holders, under such a clause, become insurers of the honesty and promptitude of those to whom the insurance company, without a written appointment, intrusts its policies for delivery. It ought to be held that, under such a clause, the insurers themselves waive it whenever, by their voluntary act, the policy leaves the office to be delivered to the insured on payment of the premium; and this, without regard to the fact that some one, having no nominal connection with the company as agent, hands over the policy and receives the premium. By the very fact of issuing a policy which requires, apparently, nothing but delivery and payment of premium to put it in force, the company arms every man into whose hands it may come with the power to receive its money; there could be no conduct more significant of an intention to waive the advantage of such a clause than this. But, without regard to the soundness of this individual opinion of what the law ought to be, the case before us, on its facts, being clearly outside the principles laid down in the cases cited, the judgment is affirmed, and appeal dismissed.

INSURANCE COMPANIES—AGENT.—WHAT CONSTITUTES AN ESTOPPEL TO DENY AUTHORITY OF: See *Kansas etc. Ins. Co. v. Saindon*, 52 Kan. 486; *ante*, pp. 356, and note; and *Hahn v. Guardian Ins. Co.*, 23 Or. 576; 37 Am. St. Rep. 709, and note, with the cases collected.

BUTLER SAVINGS BANK v. OSBORNE.

[159 PENNSYLVANIA STATE, 10.]

COTENANCY—PARTNERSHIP—PRESUMPTION.—Tenants in common, engaged in the improvement or development of the common property, are presumed, in the absence of proof of a contract of partnership, to hold the same relation to each other during such improvement or development as before it began. As to third persons, they may subject themselves to liability as partners by a course of dealings, or by their acts and declarations, but, as to each other, their relation depends on their title, until, by their agreement with each other, they change it.

COTENANCY—DEVELOPMENT OF COMMON PROPERTY.—COTENANTS who agree to carry on mining or other operations on their lands, each contributing towards the expenses in proportion to his respective interest or estate in the land, are considered, with respect both to themselves and third persons, as the ordinary owners of land working their respective shares, responsible only for their own acts, subject to no laws of partnership, and possessing distinct rights in the property.

COTENANCY—PARTNERSHIP—PRESUMPTION.—Cotenants may form a partnership for the purpose of operating the common property if they so agree; but in the absence of an agreement they are presumed to deal with each other, and the common property, as part owners, holding as cotenants, and liable to each other in account render or in equity, as the case may require.

COTENANTS.—PARTNERSHIP AGREEMENT between cotenants to drill oil-wells on the common property, each to pay one-half of the expense of producing and pumping the oil, to be run into pipe lines serving the district and there credited one-half to each of them, does not constitute a partnership between them.

T. C. Campbell, J. C. Boyle, and A. T. Black, for the appellant.

N. Black and W. H. Lusk, for the appellees.

¹³ WILLIAMS, J. The question raised on this record grows out of the following facts: The firm of D. Osborne and Brothers was engaged in drilling oil-wells and producing oil. It was an owner of some leases on which it was operating, and a part owner as a tenant in common with other part owners in others. In the same district the firm of Carruthers and Peters was engaged in the same business, and in the same manner. Each of these firms bought an undivided one-half of two leases, known respectively as the Cookman lease and the Duncan lease. Both leases were obtained from the same vendor, who was engaged in drilling a well upon one of them at the time of sale. The sale included the drilling tools and machinery in actual use, and it was agreed that Duncan, their vendor, should proceed to complete the work

of drilling he had begun. When this was done the two firms proceeded to prepare the well for pumping, each paying one-half of the expenses incurred. As soon as the first well was put in order the owners entered into an agreement with each other to drill another well on the same lease, and to pay their one-half part of the cost of it. They divided the expenses incurred in pumping and in the care of the leases in the same manner, each paying one-half. The oil produced was run into pipe lines serving the district, and there credited one-half to Osborne and Brothers and one-half to Carruthers and Peters. Upon these facts the appellant contends that the tenants in common of the Cookman and Duncan leases became partners. It is not alleged that any contract of partnership was ever entered into between the two firms, or that any new partnership name was adopted to represent them in their operations upon these leases. Their relation toward each other, as the result of their purchase of their respective interests in the leases, was that of tenants in common. They were engaged in the development and operation of the common property for their individual benefit. They were doing what tenants in common may properly do, and in the only way practicable for them, viz., turning the common property to the profit of its ¹⁴ owners, at their individual cost, and dividing the product between themselves in the pipe lines in shares corresponding with their interest in the title. The firm of D. Osborne and Brothers seems to have been badly in debt. The Butler Savings Bank was among its creditors, and was the holder of two judgments against the firm and the individuals composing it, on which writs of *fiери facias* were issued on the 29th of June, 1892. The appellant was also a creditor having one or more judgments entered against the firm. On the 2d of July, 1892, it caused a special writ of *fiери facias* to be issued, directing the sheriff to levy on the interest of D. Osborne and Brothers in an alleged partnership composed of the firms of D. Osborne and Brothers and Carruthers and Peters. The sheriff seized and sold, at the instance of the bank, the title of Osborne and Brothers in both leases. At the instance of the appellant he seized and sold the interest of Osborne and Brothers in the alleged new firm.

Whether the appellant is entitled to come in on the fund raised by the sheriff by means of a sale made upon all the writs in his hands depends on whether the alleged partnership

between the tenants in common had any existence. If it did the two leases were partnership property belonging to that partnership. The interest of Osborne and Brothers would, in that case, go to the purchaser at sheriff's sale subject to a settlement of the partnership business, and would be simply a right to receive one-half of what might remain after that business was closed up; and the proceeds of such sale would go to the special writ of *fieri facias*. If, on the other hand, no such partnership existed, then the title of D. Osborne and Brothers was that of a tenant in common owning one-half of the leases; the purchaser at sheriff's sale would succeed to their title; and the money raised would go to the bank as the proceeds of the sale of the property of its debtor. In the case of *Dunham v. Loverock*, 158 Pa. St. 197, 38 Am. St. Rep. 838, we have held at the present term that tenants in common engaged in the improvement or development of the common property will be presumed, in the absence of proof of a contract of partnership, to hold the same relation to each other during such improvement or development as before it began.

As to third persons, they may subject themselves to liability as partners by a course of dealing, or by their acts and declarations, but as to each other their relation depends on their title, until, by their agreement with each other, they change it.

¹⁵ The act of April 25, 1850, gives the courts jurisdiction in equity over the settlement of accounts between tenants in common of mines and minerals, and empowers them to "cause to be ascertained the quantity and value of the coal, iron ore, or other minerals, so taken respectively by the respective parties, and the sum that may be justly and equitably due by, and from, and to, them respectively therefor, according to the respective proportions and interests to which they may be respectively entitled in the lands."

This power over the accounts between tenants in common was exercised by the courts of equity in England long before our statute was passed; and as between the tenants in common and third parties the same controversy frequently arose that exists in this case. The effort of third parties, extending credit to them, was to hold them liable as partners, just as the appellant seeks to do here. But the rule in England, as I understand it to be, is that, when tenants in common agree to carry on mining operations upon their land, each contributing towards the expenses in proportion to his or her respective inter-

est or estate in the land, they will be considered, with respect both to themselves and third persons, as the ordinary owners of land working their respective shares of the mines, responsible only for their own acts, subject to no laws of partnership whatever, and possessing distinct rights in the property: Bainbridge on Mines and Minerals, c. 9, p. 296. The several owners may form a partnership for the purpose of operating the common property if they so agree, but, in the absence of an agreement, they will be presumed to deal with each other and the common property as part owners, holding as tenants in common, and liable to each other in account render or in equity, as the circumstances may seem to require.

In the case now before us there is no need to rely on the presumption, as the auditor has found as a fact that no partnership existed between the two firms owning the Cookman and Duncan leases. From this finding of fact the auditor correctly concluded, as a matter of law, that the special writ of *fiery facias*, issued by the appellant against the interest of D. Osborne and Brothers, in the alleged partnership, had nothing on which it could be executed.

The contention of the appellant fails, therefore, on both ¹⁶ grounds. The law does not imply a partnership between tenants in common because of the fact that they agree to develop or operate the common property, since they may rightfully do this by virtue of their respective titles as part owners. And next, the existence of an express agreement creating a partnership is negated by the finding of the auditor, concurred in by the court below. As it is thus settled that the alleged partnership did not exist, the conclusion is inevitable that the sale on the writ in favor of the bank passed the title of D. Osborne and Brothers in the two leases to the sheriff's vendee, who thereupon became a tenant in common with the other part owner.

The proceeds of the sale were therefore properly distributed in the court below, and the decree of distribution is affirmed.

PARTNERSHIP—COTENANCY. — Cotenants may become partners if they agree to assume that relation towards each other; but the law does not create that relation for them as the consequence of a course of conduct referable naturally to a relation already existing between them, making such a course of conduct to their common advantage; such as an agreement between cotenants of an oil lease to drill an oil-well on the leased premises at the common cost of the cotenants: *Dunham v. Loverock*, 158 Pa. St. 197; 38 Am. St. Rep. 838.

MEADE v. CLARKE.

[159 PENNSYLVANIA STATE, 159.]

PLEADINGS—AMENDMENT.—When, in ejectment, defendant's abstract of title omits matter material and relevant to the defense, the court should permit an amendment thereof to include the omitted matter upon such terms as are fair and just.

MARRIED WOMAN'S DEED—ACKNOWLEDGMENT—RIGHTS OF CREDITORS.—A married woman's deed executed and delivered in good faith and for a fair consideration at the time she receives the purchase money, but not acknowledged until several months thereafter, is valid as against her creditors who in the mean time have recovered judgment against her, and they acquire no lien upon the land conveyed, and cannot allege her marital disability to defeat the deed.

MARRIED WOMAN'S DEED—AVOIDANCE OF.—A married woman's deed to her land can be avoided on the ground of her marital disability by herself alone.

James S. Young and S. U. Trent, for the appellants.

K. T. Meade and James C. Doty, for the appellee.

162 **WILLIAMS, J.** Rules of court are devised and enforced by the courts to facilitate the administration of justice. This is accomplished by requiring the parties litigant to disclose to each other the nature of their demand or defense, and narrowing the range of inquiry to questions that are subjects of actual controversy. Their enforcement should not be insisted on when such a course will defeat the purposes they are intended to serve. For this reason it is usual to allow an omission made in the preparation of an abstract or a notice of special matter to be supplied by amendment upon such terms, as to continuance or costs, as shall be fair to the other party. As this case appears to us on the printed pages of the paper books it would seem that the motion for leave to amend the defendants' abstract should have been allowed. The omitted line of defense was held by the learned judge to be relevant and material. Without it justice could not be reached; and for want of it a verdict was directed in favor of the plaintiff.

But we prefer to rest our judgment in this case on a more important question. It was raised on the following facts: Mrs. Oates was the owner of the property in controversy prior to June, 1891. On the tenth day of June, 1891, she sold it to Alfred Davies, and delivered possession to him. The price was a fair one. The sale was made in good faith. A deed was prepared and executed by both husband and wife

on the same day the sale was made, and it was delivered to Davies at his request to show to his mother. It was acknowledged in due form some six months later and put upon record. Meantime, in October, 1891, a judgment was obtained in the common pleas of Allegheny county against Mr. Oates and his wife, upon ¹⁶³ which a sheriff's sale took place in July, 1892. The plaintiff, K. T. Meade, was the purchaser, and, upon his title acquired under the sheriff's deed, he brings this action of ejectment against Davies and his tenants or vendees.

On the trial the defendants asked the court to charge the jury that if the sale by Mrs. Oates to Davies was made in good faith, and for an adequate price, on the tenth day of June, the judgment entered in October was not a lien upon the land, and that the sale by the sheriff conferred no title. The learned judge refused this prayer for instructions. If Mrs. Oates had been seeking to avoid her unacknowledged deed the rule laid down in *Kirk v. Clark*, 59 Pa. St. 479, on which the learned judge relied, would have been applicable. It was applied in *Glidden v. Strupler*, 52 Pa. St. 400, where the married woman repudiated her own agreement, and in *Kirk v. Clark*, 59 Pa. St. 479, where her heirs at law asserted her title against her vendee; but I have been able to find no case in which her creditors have been allowed to assert it for her and against her will. Let it be conceded that the judgment against her was a lien upon real estate owned by her at the date of its rendition. Let it be conceded, further, that her unacknowledged deed did not bind her, and that she might have recovered the land conveyed by it from her vendee without returning to him the purchase money she had received. The question still remains, can a creditor compel her to be unjust to her vendee against her own will? As matter of fact, she had sold her property in June, received the purchase money, and delivered possession to the purchaser. As matter of law, she was not bound by her bargain until her deed was duly acknowledged. She had the right to repudiate the sale, or to perfect it by joining her husband in a proper acknowledgment of her deed. Which she would do she had the power to determine. She decided to be honest, and accordingly acknowledged the deed. She is bound by her decision. Her deed vests her title irrevocably in her vendee, and all claiming under her are bound, as she is, by it. A creditor who obtained a judgment four months after she parted with her property and delivered possession to the purchaser claims

the right to set up her disability to defeat a conveyance made in good faith, and perfected in a manner which the law declares to be binding upon her. This cannot be done.

¹⁶⁴ Disability, whether arising from infancy, or coverture or lunacy, is declared for the protection of the person on whom the disability rests. An infant can ratify after reaching a proper age. A lunatic can ratify after the return of sanity. A married woman may ratify after the coverture terminates; but as her disability results from the unity of husband and wife, she may bind herself at any time during coverture by complying with the requisite legal formalities. In *Grim's Appeal*, 105 Pa. St. 375, it was held that a married woman was bound to the same measure of good faith as other persons in like cases, except where her disability rendered her act void. In such a case she is not bound by the rules relating to estoppel but is at liberty to use her disability as a shield against the remedies applicable to other persons. Whether she will keep faith in that class of cases she alone must determine, or those on whom the law casts her right at her death.

The nearest case to this, in the question raised, is *Freiler v. Kear*, 126 Pa. St. 470. The wife in that case owned a brewery. She leased it to a firm of which her husband was a member. They were in arrears for rent. She brought suit in the name of her husband and herself, for her use, against F. G. Kear and Freiler, her husband, trading as F. G. Kear & Co. The court below held that the action could not be maintained, and that Kear could avail himself of the objection that the plaintiff was the wife of his partner and codefendant. This court reversed the judgment, holding that the husband alone could raise the question, and "that the objection of coverture could not be insisted on by a stranger to invalidate such proceedings and judgment when waived by the husband." He might have been heard to deny his wife's right of action against him, but he did not choose to deny it. His partner could not compel him to do so.

Mrs. Oates might have repudiated her deed at any time before its acknowledgment, but she did not choose to do so. No one else could do it for her, or compel her to do it. She had sold her property and had its price. She had delivered possession and her deed to the purchaser; but the statutory proof of its execution was not made when the judgment was obtained against her. This proof she soon after supplied, and the deed was then binding according to its terms. The title

165 of the purchaser related to its date; and as against a creditor who had no lien at that time it went without encumbrance.

Under this view of the case it is unnecessary to consider the effect of the act of 1887 on the form of the acknowledgment by a married woman.

The fourth assignment of error is sustained and the judgment is reversed.

As this is conclusive of the case a *venire* will not be awarded.

MARRIED WOMEN'S DEEDS—VALIDITY.—A married woman's deed properly acknowledged in the manner and under the circumstances prescribed by law conveys the title: *Hayden v. Moffatt*, 74 Tex. 647; 15 Am. St. Rep. 866, and note; note to *Logan v. Gardner*, 20 Am. St. Rep. 943; *Callahan v. Patterson*, 4 Tex. 61; 51 Am. Dec. 712. See, also, the note to *Martin v. Dwelly*, 21 Am. Dec. 256.

DUGGAN v. BALTIMORE AND OHIO RAILROAD.

[159 PENNSYLVANIA STATE, 243.]

DAMAGES—MEASURE OF.—Nominal damages are those recoverable when a legal right is to be vindicated from an invasion that has produced no actual present loss of any kind. If there has been any actual loss, then the damages must be compensatory, and for false imprisonment, or for trespass in improperly ejecting a passenger from a railroad train, such damages include, in addition to actual expenses incurred, compensation for loss of time, interruption of business, bodily or mental suffering, humiliation, and injury to feelings.

MASTER AND SERVANT—WRONGFUL ARREST BY RAILROAD DETECTIVE—RESPONDEAT SUPERIOR.—If an employee of a railway company has general authority, actual or apparent, to act for his employer in the capacity of detective officer, and such authority includes, expressly or by general usage and consent, the power to make an arrest in the employer's behalf, the mode of execution of such power, with warrant or without, is immaterial, and the employer is liable for a wrongful arrest.

RAILROADS—POWER OF CONDUCTORS—PROTECTION TO PASSENGERS.—A railroad conductor has general power and control over his train and all persons on it, with authority to compel observance of the regulations of the company, to preserve order, and to employ the whole force of trainmen and of passengers willing to assist for these purposes. These powers involve the correlative duty to protect passengers, not only from injury by negligence or accident, but also from violence and illegal annoyance or interference by other parties, but he is not required to enter into a contest with, or put himself in opposition to, officers of the law, and if he merely stands by, without taking part in the arrest of a passenger by known policemen, he is not necessarily bound to inquire into their authority, or to assert his own against it.

RAILROADS—DUTY OF CONDUCTOR TO PROTECT PASSENGER FROM ILLEGAL ARREST.—When a railroad detective officer telegraphs to a conductor on a train, to have two described passengers arrested at a certain station, and the telegram is received by the baggage master at such station, who calls policemen to await the arrival of the train, and such policemen upon its arrival enter the train, and the conductor, upon receiving the telegram, points out a passenger as the one to be arrested, if it transpires that the passenger arrested is not the person intended by the telegram it is a question for the jury to determine, in an action against the company to recover for such arrest, whether the conductor took an unwarranted part in the illegal arrest, or whether he properly performed his duty in relation to the protection of the passenger.

TRESPASS for arrest and removal from a train. The plaintiff purchased an excursion ticket from Connellsville, Pennsylvania, to Pittsburgh and return. When his train got to McKeesport, policemen boarded the train, arrested, and put him in jail under authority of the following telegram:

"To conductor of No. 9, McKeesport, Pa:

"If two men got on at Connellsville, one day operator here, small in size, small hump on back, black moustache; other, slender built, very dark complexion, dark moustache; have both arrested and advise me, Connellsville.

[SIGNED] "ROBERT F. SHEPHARD."

This telegram was received by the baggage master at McKeesport before the arrival. He summoned policemen to await its arrival, and upon its arrival gave the telegram to the conductor, and the policemen boarded the train. The conductor then said to them: "This is the man, take him off," or "These are the two men that got on at Connellsville," pointing out the plaintiff as one of them. When the conductor was about to start his train, he said: "If you want to take this man off, take him off; I will not stay here all day," or, "Take him off; there are the men; if you want them, take them off," or words to like effect. Shephard, who sent the telegram, upon coming to McKeesport, three hours after the arrest, discovered that plaintiff was not the man wanted, and he was immediately released. Plaintiff recovered a judgment for nominal damages only, and appealed.

F. P. Iams and C. C. Brock, for the appellant.

J. McCleave, for the appellee.

253 MITCHELL, J. The instructions to the jury on the measure of damages cannot be sustained. The charge that plaintiff could recover "only such damages as resulted from

his being unable to complete his trip that day" is substantially the same as the point presented in *Pennsylvania R. R. Co. v. Spicker*, 105 Pa. St. 142, that "damages must be limited to compensation for loss of time, expenses incurred then and there, and the cost of another ticket," which, this court held, was properly refused.

The further charge that plaintiff's recovery "could only be by way of compensation, and if he sustained no loss in consequence of it, the damages would simply be nominal," was likely to confuse the jury as to nominal and compensatory damages, and to mislead them to suppose the latter should only include definite pecuniary loss. Such is not the rule. Nominal damages are those recoverable where a legal right is to be vindicated from an invasion that has produced no actual present loss of any kind. If there has been any actual loss, then the damages must be compensatory, and for false imprisonment, as for trespass in improperly ejecting plaintiff from the cars, such damages include, in addition to actual expenses incurred, compensation for loss of time, interruption of business, bodily or mental suffering, humiliation, and injury to feelings. If the plaintiff was entitled to have his case go to the jury at all, these matters were proper subjects for consideration in estimating his compensation: *Perry v. Pittsburgh etc. Ry. Co.*, 153 Pa. St. 236; 7 Am. & Eng. Ency. of Law, 690.

²⁵⁴ The main question in the case, was the defendant responsible for the violation of plaintiff's rights? may turn on either of two grounds: 1. Was Shephard the agent of defendant in ordering the arrest, and had he such authority, actual or apparent, as justified the conductor in obeying his telegraphed order? It is not necessary, as the learned judge seems to have told the jury, that the defendant should have authorized Shephard to make an arrest without a warrant. If he had the general authority, actual or apparent, to act for the defendant in the capacity of detective officer, and such authority included, expressly or by general usage and consent, the power to make an arrest in their behalf, then the mode of execution of such power, with warrant or without, was immaterial, and the defendant was liable in either event. That is the general ground of the operation of the maxim *respondeat superior*. If the master orders the thing done he is responsible for the manner in which the servant does it. There

was some evidence of Shephard's employment as detective for the defendant, and that question must go to the jury.

2. Was the defendant made liable by the action of the conductor? This also was a question for the jury. The conductor has general power and control over the train, and all persons on it, with authority to compel observance of the regulations of the company, to preserve order, and to employ the whole force of the trainmen and of passengers willing to assist for these purposes. These extensive powers involve the correlative duty to protect passengers, not only from injury by negligence or accident, but also from violence and illegal annoyance or interference by other parties. In *Pittsburgh etc. R. R. Co. v. Hinds*, 53 Pa. St. 512, 91 Am. Dec. 224, a woman passenger was injured during a fight among a mob of disorderly men that had got on the train at a way station. This court held that the railroad company escaped liability for allowing them to get on only because the evidence showed clearly that the conductor had no opportunity or force adequate to prevent them, and the railroad company was not bound to anticipate such an occurrence, but that it was liable if the conductor did not do all he could to stop the fighting. The law on this point, as to the duty to protect passengers from violence and disorder, is laid down by Chief Justice Woodward with great stringency. The conductor, ²⁵⁵ he says, "has large powers at his disposal, and, if properly used, they are generally sufficient to preserve order. . . . His official character and position are a power. Then he may stop the train, and call to his assistance the engineer, the fireman, all the brakemen, and such passengers as are willing to lend a helping hand. . . . Until at least he has put forth the forces at his disposal no conductor has a right to abandon the scene of conflict." Again, in *Pittsburgh etc. R. R. Co. v. Pillow*, 76 Pa. St. 510, 18 Am. Rep. 424, it is said that there is no sound distinction between injuries from negligence in the equipment or management of the train and those arising from the misconduct of passengers upon it. "If the employees of the road had no control or power over passengers this argument would be sound. But they have such power, and they are just as responsible for its proper exercise as they are for the proper running of the train." This case was quoted approvingly in *Rommel v. Schambacher*, 120 Pa. St. 579, 6 Am. St. Rep. 732, where, upon the same principle, an innkeeper was held liable for not protecting a guest from the drunken

freak of another. And what is said in *Lang v. Pennsylvania R. R. Co.*, 154 Pa. St. 342, 35 Am. St. Rep. 846, as to the protection of goods, applies *a fortiori* to the protection of the persons of passengers. "The railroad company was represented in the carriage and safekeeping of the freight on the train by the men to whom the train had been committed. If they deserted their posts and left the goods uncared for, and they were stolen or destroyed, their employer must suffer for their inefficiency."

In the present case the telegraphed order of Shephard was addressed to the conductor; he appears to have accepted it as valid, and the subject was within the general line of his duty. If, therefore, he took part in the illegal arrest the defendant was liable for the consequences of his act. But, even beyond this, it was his duty, under ordinary circumstances, as already said, to protect his passengers from trespass while under his care, and if he stood by and saw them illegally molested in any way, without an effort to protect them, it would be negligence for which the defendant would be liable. He was not, however, required to enter into a contest with, or put himself in opposition to, the officers of the law, and if he merely stood by without taking part in the arrest by known policemen he was not necessarily bound to inquire into their authority, or assert his own ²⁵⁶ against it. How far the conductor in the present case assisted in the arrest is the subject of some conflict in the testimony, and what knowledge he had of the illegality of it is not clear. Although the telegram was addressed to him, as the conductor of that train, he does not seem to have assumed the direction of the affair, but rather to have acquiesced in what the police whom he found there on his arrival should do, with the suggestion that they should not detain his train. The case must, therefore, go to the jury to determine what he did, and whether, in accordance with the principles of law, it was a proper performance of his duty.

The distinction made in the English cases cited by appellee, with reference to acts *ultra vires* as to the corporation, does not seem to have commanded general assent in this country (see 7 Am. & Eng. Ency. of Law, 684), but we are not required to consider it at present, as our own cases show that the alleged acts of the conductor, as well as of Shephard, were such as might be viewed by the jury as within the apparent authority delegated by the defendant.

The paper book of appellant is open to just complaint. In a rather full brief of cases from other states not a single Pennsylvania decision is referred to, although, as this opinion shows, there are several which are much closer in point than any of those cited, and they are, of course, much more authoritative with us than those of other states, however well reasoned. In the pressure of business on this court we ought not to be called on to do counsel's work. It is not always possible to recall at once even cases with which we are familiar, and we should be able to rely on counsel for reference, at least, to every thing relevant and material in our own reports. Counsel who neglect this duty take a risk not fair either to the court or their client.

Judgment reversed and *venire de novo* awarded.

DAMAGES—NOMINAL, WHEN ALLOWED.—Nominal damages exist only in name, and not in amount, and should be awarded where some right has been invaded, but where no actual damages have been shown: *Stanton v. New York etc. Ry. Co.*, 59 Conn. 272; 21 Am. St. Rep. 110, and note; *Hillebrant v. Brewer*, 6 Tex. 45; 55 Am. Dec. 757; *Heichew v. Hamilton*, 4 G. Greene, 317; 61 Am. Dec. 122; *Southern R. R. Co. v. Kendrick*, 40 Miss. 374; 90 Am. Dec. 332, and note; *First Nat. Bank v. Telegraph Co.*, 30 Ohio St. 555; 27 Am. Rep. 485.

DAMAGES—COMPENSATORY.—Damages should be such as will put the plaintiff in the same situation he would have been had the injury alleged not have been committed: *Stallings v. Corbett*, 2 Spear, 613; 42 Am. Dec. 388; *Seely v. Alden*, 61 Pa. St. 302; 100 Am. Dec. 642. Where an injury has been caused in the absence of actual malice, the rule is compensatory damages, or such as will indemnify the plaintiff: *Barnett v. Reed*, 51 Pa. St. 190; 88 Am. Dec. 574; *Heil v. Glanding*, 42 Pa. St. 493; 82 Am. Dec. 537, and note. Compensatory damages for causing personal injuries are to be measured by the loss of time during the cure, the expense incurred in respect thereto, the pain and suffering undergone by the plaintiff, and the pecuniary loss consequent upon any permanent injury: *Chicago v. Martin*, 49 Ill. 241; 95 Am. Dec. 590.

RAILROADS—LIABILITY FOR WRONGFUL ARREST OF PASSENGER BY SERVANT.—A railroad company is liable in exemplary damages for the wrongful arrest and false imprisonment of a passenger without probable cause, made or caused to be made by its conductor in charge of its train, during the execution of the contract to carry, though the act was unauthorized by the company: *Gillingham v. Ohio River R. R. Co.*, 35 W. Va. 588; 29 Am. St. Rep. 827, and note. But see *Mulligan v. New York etc. Ry. Co.*, 129 N. Y. 506; 26 Am. St. Rep. 539, and note, with the cases collected. See, also, the note to *Chicago etc. R. R. Co. v. Flexman*, 42 Am. Rep. 38.

RAILROADS—DUTY TO PROTECT PASSENGERS.—A common carrier of passengers by rail is bound to protect them against injury from the negligence or willful misconduct of its servants while performing the contract to carry: *Gillingham v. Ohio River R. R. Co.*, 35 W. Va. 588; 29 Am. St. Rep. 827,

and note, with the cases collected; *Mulligan v. New York etc. Ry. Co.*, 129 N. Y. 506; 26 Am. St. Rep. 539, and note. See, also, the note to *International etc. Ry. Co. v. Anderson*, 27 Am. St. Rep. 907, 908, and the extended note to *Rommel v. Schambacher*, 6 Am. St. Rep. 735.

TANNEY v. TANNEY.

[159 PENNSYLVANIA STATE, 277.]

COTENANCY.—PURCHASE AT TAX SALE of the common property by one cotenant in the name of a third person inures to the benefit of all the cotenants, and all that the purchaser can demand from them is contribution to the expense by which the common property has been relieved from embarrassment.

COTENANCY.—PURCHASE OF OUTSTANDING TITLE.—A conveyance to one of several cotenants, or a deed to one of two devisees of the same land, inures to the benefit of all who come in under the same title, and are holding jointly or in common.

COTENANCY.—PURCHASE OF OUTSTANDING TITLE.—As between persons having a joint or common interest in an estate, one of them cannot purchase an encumbrance or outstanding title, and set it up against the others for the purpose of depriving them of their interest.

COTENANCY.—PURCHASER AT TAX SALE—RESULTING TRUST—LIMITATIONS. A purchase of the common property by one cotenant at tax sale does not create a resulting trust, so as to prevent the other cotenants from maintaining ejectment after the expiration of the time named, in a statute providing that “no right of entry shall accrue, or action be maintained, to enforce any implied or resulting trust as to realty, but within five years after such trust accrued.

TRUSTS.—IMPLIED OR RESULTING TRUSTS ARISE when land is purchased in the name of one person with the money of another; or when a purchase of land is made by a trustee, in his own name, with trust money; or when such purchase is made by a partner in his own name with partnership funds; or when a conveyance has been obtained by fraud, or in similar cases.

ESTOPPEL.—NO RATIFICATION OR ESTOPPEL CAN ARISE when the act set up as such was done in entire ignorance of the material facts prompting action.

COTENANCY.—PURCHASE AT TAX SALE—ESTOPPEL.—Cotenants who accept the proceeds of a tax sale of the common property without knowledge that the estate has been purchased at such sale by their cotenant, and without any thing to excite suspicion or stimulate inquiry, are not estopped from avoiding the deed to the purchaser. In such case they need not make inquiry before accepting the money.

G. H. Quail, for the appellant.

L. P. Stone, for the appellees.

²⁸⁰ DEAN, J. The parties to this suit filed a case stated in the nature of a special verdict for the opinion of the court.

The material facts agreed upon are these: William Tanney, the ancestor of these parties, died intestate in 1857. At his death he was the owner of a lot, on which was a frame dwelling-house, in the city of Pittsburgh. He left a widow, Amelia Tanney, and four children—William, Emma, Julia, and Lewis. The whole family occupied the property until 1869. At this time the children had married, and all had left the city. The property was thereafter occupied by tenants, and the rent, with consent of the children, was paid to their mother, Amelia, who died December 10, 1881. Up to January 1, 1877, this defendant, Lewis H. Tanney, had expended in improvements, payment of taxes, and municipal liens, \$500, no part of which was repaid him by his brother and sisters, his cotenants.

William Tanney, one of the plaintiffs, at the same time had also paid out \$500 for the same purposes, no part of which was repaid by the sisters. The taxes for 1878 and 1879, amounting to \$40.73, not having been paid, they were entered as a lien, *scire facias* issued, judgment had, execution issued, and the property sold at sheriff's sale. One John J. Lawrence became the ostensible purchaser at a bid of \$500, and deed was duly acknowledged to him March 12, 1881. Lewis H. Tanney, the defendant, by agreement, furnished Lawrence the \$500 purchase money paid to the sheriff, and Lawrence conveyed the property to Lewis, March 24, 1881, who soon after took possession, and has since retained it. The \$500 was appropriated, to costs ²⁸¹ and taxes, \$63.22, to the widow and four children the balance, \$236.78, the widow's share being \$78, and \$39.46 for each of the children. These plaintiffs each executed receipts dated, respectively, July 19, August 18, and August 27, 1881, for these shares. They are all alike, and this is a copy, without signature, of each one of them: "Received August 27, 1881, of A. S. and W. S. Moore, the sum of thirty-nine and $\frac{46}{100}$ dollars in full of my share of balance due the heirs of William Tanney, deceased, out of the sale of real estate in Allegheny county, Pa., sold upon execution issued upon judgment No. 37, September term, 1879, in the court of common pleas of Allegheny county. No. 1, D. T. D."

When the money was paid, all the distributees were of full age; William, Emma, and Lewis lived at the time in Beaver county, and Julia in Cleveland, Ohio; the money was paid and receipts given at their homes; A. S. and W. S. Moore, who paid the money and took the receipts, were residents of

Beaver county. Up until the dates of the receipts no one of them, except Lewis, had any knowledge of the filing of the liens or the sheriff's sale of the property. As late as the latter part of 1879, at the solicitation of Lewis, all the parties had executed and delivered a power of attorney to Alderman Leslie, authorizing him to dispossess a delinquent tenant and relet the property; under the power he obtained possession, and rented to a new tenant June 1, 1880, and thereafter accounted to Lewis for the rents. This action of ejectment was not begun until January 3, 1891, more than nine years after the sheriff's sale and the payment of the purchase money.

On this statement of facts it was agreed that the court should enter such judgment "as in their opinion the law and equities of the case will warrant."

The court entered judgment for plaintiffs for the undivided three-fourths of the land, subject to the payment by each plaintiff to defendant of the sum of \$39.46, the share received of the purchase money at sheriff's sale, with interest from July 19, 1881. From this judgment defendant prosecutes this appeal, assigning for error the judgment for plaintiffs, and the refusal of the court to enter judgment for defendant.

If, without collusion, Lawrence had been a purchaser for himself with his own money, and had afterwards conveyed the ²⁸² lot to Lewis Tanney, Lewis would have taken a good title as against even his cotenants; for the title of all the tenants having, for the debt of all, passed by regular sale to a third party, Lewis owed no duty thereafter to his cotenants with regard to it. But the purchase by Lawrence was only nominal; he merely acted for Lewis, and paid for it with Lewis' money, then reconveyed to him. The change in title was only in form; the interests of the cotenants remained the same; the deed to Lewis, if of any value, inured to the benefit of all the same as if he had purchased the encumbrance without a sale. Each one of two or more tenants in common of land stands in a relation of confidence to his cotenants with reference to the common property. If one of them purchases an outstanding title, and undertakes to claim under it the common property as against the others, if they contest it his claim will not be allowed, because it must be presumed that each, as regards the common interests, acts for all; the same principle is invoked as is enforced between all persons

who occupy towards each other a fiduciary or confidential relation.

The rule, as deduced in *Weaver v. Wible*, 25 Pa. St. 270, 64 Am. Dec. 696, from the many authorities there cited, is that "community of interest produces community of duty." And further: "A conveyance to one of several tenants in common, or a deed to one of two devisees of the same land, shall inure to the benefit of all who came in under the same title, and are holding jointly or in common. Where several persons have a joint or common interest in an estate it is not to be tolerated that one shall purchase an encumbrance or an outstanding title, and set it up against the rest for the purpose of depriving them of their interests. Chancellor Kent, with great truth, remarked 'that such proceeding would be repugnant to a sense of refinement and accurate justice, and would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's claim which the relationship of the parties created.' All that can be demanded is contribution from each to the expense of any purchase which releases the common interest from embarrassment." And, as is said in *Chorpenning's Appeal*, 32 Pa. St. 315, 72 Am. Dec. 789, "the rule is inflexible, without regard to the consideration paid, or the honesty of intent. Public policy requires this, not only as a shield to the parties represented but as a guard against temptation on part of representatives."

²⁸³ In *Meyer's Appeal*, 2 Pa. St. 463, these were the facts: Four of the five children, tenants in common of a tract of land, gave a power of attorney to their brother, the fifth one, authorizing him to redeem land of their ancestor which had been sold at a tax sale; the brother did not redeem, but, after the title had become absolute in the purchaser, bought it from him with his own money in his own name, and then claimed the land to the exclusion of his cotenants. *Held*, That the sale was voidable at the option of the other heirs.

The case before us is stronger on its facts against the defendant than the one cited, for Lewis Tanney was himself the purchaser at the sale for taxes, while in *Meyer's Appeal*, 2 Pa. St. 463, the purchaser was a stranger, who, of his own volition, had bought and paid the consideration money out of his own pocket. That the sheriff here made the sale for taxes on a municipal lien in no way changes the application of the principle. The sale resulted from the joint default of all the

tenants in common; it was the duty of all to share equally in the payment of taxes; but, Lewis had immediate charge of the common property, for he procured the power of attorney for Leslie, and to him Leslie accounted for the rents up to the date of the sheriff's sale; when he purchased with his own money, the purchase inured to the common benefit; that is, it discharged the lien for taxes, but their interests were not divested by the sale unless they ratified it. What we have said proceeds on the presumption the law raises—if Lewis had been openly the purchaser at sheriff's sale, and had taken the deed in his own name, the interests in the land would have remained the same, and the possession would have been constructively in all as tenants in common, notwithstanding the naked legal title was in Lewis.

Nor will the statute of limitations of the 22d of April, 1856, under the facts of record, avail the defendant. That act says: "No right of entry shall accrue or action be maintained to enforce any implied or resulting trust as to realty, but within five years after such equity or trust accrued." These plaintiffs are not seeking to enforce an implied or resulting trust; they are demanding possession of the undivided three-fourths of their land from which defendant wrongfully keeps them. In reply defendant admits they once had title, but alleges by the sheriff's deed their interest was divested and vested in him, ²⁸⁴ and if plaintiffs have any claim it is because a trust is implied or has resulted from his purchase, and, as the action was not brought within five years, the plaintiffs are barred by the act of 1856.

They answer that, as to them, the sheriff's deed is a nullity; their relation as tenants in common was not changed by it, for the policy of the law forbids such an attempt by Lewis to oust his cotenants from the common inheritance; especially in view of the fact, that, at the date of the sheriff's sale, he was in the active management of the property, to whom Leslie accounted for rents and expenditures. They claim no benefit from his sheriff's deed, and aver that it cannot affect their right, when they elect to avoid it. In this they are correct. If Lewis had purchased in his own name an outstanding better title to the common property he would have held it as trustee for all, and it would have been so decreed, on reimbursing him their respective shares of his outlay. But he purchased no outstanding title in this case. The legal title and possession in all the tenants were indisputable from the

death of the father in 1857 until the acknowledgment of the sheriff's deed in 1881; each, during that time, was, with reference to the common property, constructively trustee for the others; neither could, by a collusive arrangement with a stranger, wrest from the others their interests and appropriate the whole; the colorable sheriff's sale, permitted, if not prompted, by Lewis can be no more effective for that purpose than if he had by his voluntary deed conveyed the whole to Lawrence, and then had taken a reconveyance to himself. Nothing short of an unequivocal, hostile possession under the sheriff's deed, for twenty-one years, would have been effectual to bar the right of entry of the cotenants under the common title which came to them from their father in 1857. It is not a resulting trust. An implied or resulting trust is where land is purchased in the name of one person, and the money paid by another; or where a purchase is made by a trustee of land in his own name with trust money; or where a purchase of land is made by a partner in his own name with partnership funds; or where a conveyance has been obtained by fraud; these, and cases of like character, come under the head of implied or resulting trusts.

Here, one being privy in estate legal and equitable with three ²⁸³ others, by a covinous device attempts to strip his cotenants of their shares, and appropriate the whole. They could, with full knowledge of the transaction, accept the purchase money and ratify it; or they could elect to treat the sheriff's deed as a mere nullity, and rest on their undisputed title for their right to possession. This last, they allege, is their attitude here; the defendant replies, they accepted their shares of the surplus purchase money, and are estopped now from avoiding the sheriff's deed. The facts of record must form the basis of judgment in this particular, and we concur with the court below that not only do they fail to show plaintiffs knew who was the real purchaser, but these facts show affirmatively they did not know their brother was. There can be no ratification or estoppel where the act which is set up as constituting ratification was done in entire ignorance of the material facts prompting action.

Nor was there imposed upon them the duty of inquiry before accepting the money, for there was nothing to excite suspicion or to stimulate inquiry. The purchase by the brother was concealed by a method most likely to lure to inaction; a public sale to a stranger, on an execution at the

foot of a debt which they knew they owed, and which had been judicially ascertained, might well move them to the conviction that their property had passed to a stranger. To say they could have discovered the facts by reasonable diligence is of no weight in view of the circumstances. As is remarked in *Maul v. Rider*, 59 Pa. St. 167, a case in some of its features resembling the one before us: "There are few facts which diligence cannot discover, but there must be some reason to awaken inquiry and direct diligence in the channel in which it would be successful." As they did not know the material fact here, that Lewis was the purchaser at sheriff's sale, when they accepted the money, they are not estopped from now asserting their right.

As to the alleged hardship of imposing upon one tenant in common the care of the common property and expenditure of money in excess of his receipts for the benefit of his cotenants who live remote from it, and are either unable or unwilling to contribute their share, and then prohibiting him from being a bidder to protect his own interests, such hardship is more apparent than real. The common property is chargeable with ²⁸⁶ the common debt reasonably necessary for its preservation; any one of the owners can insist on an equitable accounting, whereby at the foot of a judicial decree satisfaction can be had; further, the court of common pleas is always open for proceedings in partition, by which the property can be divided or sold, and the proceeds in excess of equitable charges divided among the tenants in common. But neither good morals nor law will sustain this sort of proceeding on the part of one tenant in common, to oust his brother and sisters from the common inheritance.

There is a fact disclosed in this case, not by any means exceptional, to which we call the attention of the bar. Care and accuracy in the preparation of paper books is as much a professional duty as pointed and logical presentation of the client's cause. While not seldom many authorities are cited which have little or no bearing on the questions to be decided, still our duty requires of us an examination of all those which counsel point out to us as sustaining his argument. In view of this he should correctly give us the volume, page, and names of the parties in each citation. As an illustration of the unnecessary labor imposed by careless citation, in the appellee's paper book eleven cases are cited as ruling that a tenant in common is prohibited by the policy

of the law from acquiring, as against his cotenants, an antagonistic title. The third case cited is *James v. Conway*, 4 Yeates, 111. There is no such case in 4 Yeates. We turned to the volume and page, and found *Rodgers v. Gibson*, a case ruling that a judgment creditor is not within the protection of the recording acts; we then turned to the names of parties in the table of cases given in the beginning of the volume, and find no case of *James v. Conway*; then to the index at the end of the book, and found, after careful examination, under the head of "Limitation of Actions," what occurred to us as a possible reference bearing on this case, "That in case of fraud the statute of limitations only commences to run from the time the right of action accrues"; that referred to page 109; on turning to that page we find a case of *Jones v. Reese's Executors*, one of whom is named Conoway, ruling that where a free negro, ignorant of his freedom, had, in the early days of the commonwealth, been sold as a slave his right of action for his services against those who fraudulently ²⁵⁷ held him accrued only when he had discovered the fraud. We infer this is the case meant, for although the bearing of this decision on the case in hand is somewhat remote no other in that book has any bearing on it at all. If this inference be correct, then neither the name of plaintiff, defendant, nor page is correctly given in the paper book. Of course, whether a case is in point is a matter of opinion in which we often have occasion to differ from counsel, but the name of parties, volume, and page are facts, misstatements of which are the result of carelessness and indifference. We have a right to expect of counsel such accuracy of reference as will enable us to determine readily where the law cited by them can be found; it is our duty then to examine and consider it. Another case cited among the same eleven is *McDowell v. Potter*, 8 Barr, 19; this should be page 189; the next, 8 Watts, 16, should be page 12; then *Duff v. Wilson*, Pa. 442, is cited, the volume not given. There are a number of other errors, all going to show, either careless preparation of manuscript or indifferent proof-reading; it is not material which. The duty of counsel to secure accuracy is just as imperative in reading proof as in the preparation of manuscript; if they neglect to do either, it is often impossible for us to give to their causes that critical examination their importance demands. We are led to these remarks by what seems to us a

growing evil, which, on being brought to the attention of the profession, we are confident will be cured.

The judgment is affirmed and appeal dismissed at costs of appellant.

COTENANCY—PURCHASE AT TAX SALE OF COMMON PROPERTY BY COTENANT.—A cotenant who purchases the whole of the common property at a sale thereof for delinquent taxes does not acquire any interest or title as against his cotenants: *Cocks v. Simmons*, 55 Ark. 104; 29 Am. St. Rep. 28, and note; but it inures to the benefit of all of his cotenants: *Donnor v. Quartermas*, 90 Ala. 164; 24 Am. St. Rep. 778, and note, with the cases collected.

COTENANCY—PURCHASE OF OUTSTANDING TITLE BY COTENANT.—A tenant in common in possession of the common property is bound to do nothing with a view to prejudicing the interests of his cotenants, and therefore cannot buy in an outstanding title to the prejudice of their rights: *Carpenter v. Carpenter*, 131 N. Y. 101; 27 Am. St. Rep. 569, and note; *Venerable v. Beauchamp*, 3 Dana, 321; 28 Am. Dec. 74, and extended note.

TRUSTS—RESULTING TRUSTS—WHEN ARISE.—If land is purchased in the name of one person, but the consideration is paid by another, such land, though conveyed to the former, will be held by him in trust for the latter: *Riley v. Martinelli*, 97 Cal. 575; 33 Am. St. Rep. 209, and note; *Champlin v. Champlin*, 136 Ill. 309; 29 Am. St. Rep. 323, and note, with the cases collected. See the extended note to *Neill v. Keese*, 51 Am. Dec. 751.

COTE v. MURPHY.

[159 PENNSYLVANIA STATE, 420.]

CONSPIRACY—COMBINATION OF EMPLOYERS TO RESIST ADVANCE IN WAGES.

When workmen engaged in building trades lawfully combine to artificially advance wages by reducing the hours of labor, and associations of employers in such trades combine and agree not to sell materials to contractors who concede to the demands of the workmen, and to induce other dealers by all lawful means not to furnish such materials, such associations are not liable in damages for conspiracy to one who aids the striking workmen by selling materials to them and to other contractors, and who, by reason of the combination of such associations, is not able to procure all the materials he can dispose of. The fact that such associations inform dealers that they will not buy from them if they furnish materials to any one who is aiding such workmen is not such coercion or threat as renders their combination a conspiracy.

CONSPIRACY.—COMBINATION OF EMPLOYERS not to force down the price of labor, but to resist, by all lawful means, a combination of employees to artificially advance wages by reducing the hours of labor is not a conspiracy.

CONSPIRACY—UNLAWFUL COMBINATION—WHAT CONSTITUTES.—An act lawful in an individual can be the subject of civil conspiracy when done in concert only when there is a direct intention that injury shall result from it, or when the object is to benefit the conspirators to the preju-

dice of the public or the oppression of individuals, and when such prejudice or oppression is the natural and necessary consequence.

CONSPIRACY.—A COMBINATION OF DEALERS containing no elements of an intent to restrain trade for the purpose of greed or profit, or of malice, is not an unlawful conspiracy.

CONSPIRACY.—AGREEMENTS OR COMBINATIONS ARE NOT UNLAWFUL so as to constitute conspiracies unless they are for acts or omissions, whether as ends or means, which would be unlawful apart from agreement.

J. McF. Carpenter and J. S. and E. G. Ferguson, for the appellants.

J. A. Wakefield and J. W. Kinnear, for the appellee.

424 DEAN, J. The defendants were members of the Planing Mill Association of Allegheny county and Builders' Exchange of Pittsburgh. The different partnerships and individuals composing these associations were in the business of contracting and building, and furnishing building material of all kinds. On the 1st of May, 1891, there was a strike of the carpenters, masons, and bricklayers in the building trades, bringing about, to a large extent, a stoppage of building.

The men demanded an eight hour day, with no reduction in wages theretofore paid, which the employers refused to grant; then a strike by the unions of the different trades was declared. The plaintiff, at the time, was doing business in the city of Pittsburgh as a dealer in building materials. He was not a member of either the "Planing Mill Association" or of the "Builders' Exchange"; there were also contractors and builders, who belonged to neither of these organizations, who conceded the demands of the workmen; they sought to secure building material from dealers wherever they could, and thus go on with their contracts; if they succeeded in purchasing the necessary material the result would be that at least some of the striking workmen would have employment at a higher rate of wages than the two associations were willing to pay; the tendency of this was to strengthen the cause of the strikers, for those employed were able to contribute to the support of their fellow-workmen who were idle. The two associations already named sought to enlist all concerned as contractors and builders or as dealers in supplies, whether members of the associations or not, in the furtherance of the one object, resistance to the demands of the workmen. The plaintiff and six other individuals or firms engaged in the same business refused to join them, and undertook to continue sales of building material to those builders who had

conceded the eight hour day. The Planing Mill Association and Builders' Exchange tried to limit their ability to carry on work at the advance, by inducing lumber-dealers ⁴²⁵ and others to refrain from shipping or selling them in quantities the lumber and other material necessary to carrying on the retail business; in several instances their efforts were successful, and the plaintiff did not succeed in purchasing lumber from certain of the wholesale dealers in Cleveland and Dubois, where he wanted to buy. The defendants were active members of one or other, or both, of the associations engaged in the contest with the striking workmen. The strike continued about two months; after it was at an end the plaintiff brought suit against defendants, averring an unlawful and successful conspiracy to injure him in his business, and to interfere with the course of trade generally, to the injury of the public; that the conspiracy was carried out by a refusal to sell to him building materials themselves, and by threats and intimidation preventing other dealers from doing so. Under the instructions of the court, upon the evidence, there was a verdict for plaintiff in the sum of two thousand five hundred dollars damages, which the court reduced to fifteen hundred dollars; then judgment, and from that defendants take this appeal.

The plaintiff's case is not one which appeals very strongly to a sense of justice. The mechanics of Pittsburgh, engaged in the different building trades, on the 1st of May, 1891, demanded that eight hours should be computed as a day in payment of their wages. Their right to do this is clear. It is one of the indefeasible rights of a mechanic or laborer in this commonwealth to fix such value on his services as he sees proper, and, under the constitution, there is no power lodged any where to compel him to work for less than he chooses to accept. But in this case the workmen went further: they agreed that no one of them would work for less than the demand, and by all lawful means, such as reasoning and persuasion, they would prevent other workmen from working for less. Their right to do this is also clear. At common law this last was a conspiracy, and indictable, but under the acts of 1869, 1872, 1876, and 1891, employees, acting together by agreement, may, with few exceptions, lawfully do all those things which the common law declared a conspiracy. They are still forbidden, in the prosecution of a strike, preventing any one of their number who may desire to labor from doing so, by

force or menace of harm to person or property; but the strike here was conducted throughout in an orderly, lawful manner. The employers, contractors, ⁴³⁶ and others, engaged in building and furnishing supplies, members of the two associations already mentioned, to which these defendants belonged, refused to concede the demands of the workmen, and there then followed a prolonged and bitter contest. The members of the associations refused to furnish supplies to those engaged in the construction of any building where the contractor had conceded the eight hour day. This, as individual dealers, they had a clear right to do. They could sell and deliver their material to whom they pleased. But they also went further: they agreed among themselves that no member of the association would furnish supplies to those who were in favor of or had conceded the eight hour day, and that they would dissuade other dealers, not members of the associations, from furnishing building material to such contractors or retail dealers; to the extent of their power, this agreement was carried out. This clearly was combination, and the acts of assembly referred to do not, in terms, embrace employers; they only include within their express terms workmen; hence, it is argued by counsel for appellee, these defendants are subject to all the common-law liability of conspirators in their attempts to resist the demand for increased wages; that is, there can be a combination among workmen to advance wages, but there can be no such combination of employers to resist the advance; that which by statute is permitted to the one side the common law still denies to the other. If this position be well taken we then have this inequality: the plaintiff who is aiding a combination, either directly or indirectly, intentionally or unintentionally, to advance wages, sues for damages members of another combination who resist the advance. Nor is there any difference in the character of the acts or means on both sides in furtherance of their purposes.

The workmen will not work themselves, and they use persuasion and reason with their fellows to keep them from going to work until the demand is conceded; the employers will not sell to contractors who concede the demand, and they do their best to persuade others engaged in the same business from doing so.

Then, the element of real damage to plaintiff is absent; by far the larger number of dealers in the city and county were members of the combination which refused to sell; only the

plaintiff and six others refused to enter the combination; the ⁴²⁷ result was that these seven had almost a monopoly of furnishing supplies to all builders who conceded the advance. Plaintiff admits in his own testimony that thereby his business and profits largely increased; in a few instances he paid more to wholesale dealers and put in more time buying than he would have done if the associations had not interfered with those who sold him; but it is not denied that, as a result of the combination, he was individually a large gainer. True, he avers that, if defendants had gone no further than to refuse to sell themselves, he would have made a great deal more money; that is, he did not make as large a sum as he would have made if they had not dissuaded others, not members of the association, from selling to him; but that, by the fact of the combinations and strike, he was richer at the end than when they commenced is not questioned.

We have, then, these facts, somewhat peculiar in the administration of justice: A plaintiff suing and recovering damages for an alleged unlawful act, of which he himself, in so far as he aided the workmen's combination, is also guilty, and both acts springing from the same source, a contest between employers and employed as to the price of daily wages; and then the further fact, that this contest, instead of damaging him, resulted largely to his profit.

We assume, so far as concerns defendants, if their agreement was unlawful, or, if lawful, it was carried out by unlawful acts to the damage of plaintiff, the judgment should stand. All the authorities of this state go to show that while the act of an individual may not be unlawful, yet the same act, when committed by a combination of two or more, may be unlawful, and therefore be actionable. A *dictum* of Lord Denman, in *Regina v. Seward*, 1 Ad. & E. 711, gives this definition of a conspiracy: "It is either a combination to procure an unlawful object or to procure a lawful object by unlawful means." This leaves still undetermined the meaning to be given the words "lawful" and "unlawful," in their connection in the antithesis. An agreement may be unlawful in the sense that the law will not aid in its enforcement, or recognize it as binding upon those who have made it, yet not unlawful in the sense that it will punish those who are parties to it, either criminally or by a verdict in damages. Lord Denman is reported to have said afterwards in ⁴²⁸ *Regina v.*

Peck, 9 Ad. & E. 690, that his definition was not very correct: See note to Wharton's Criminal Law, sec. 2291.

It is conceded, however, in the case in hand, any one of defendants, acting for himself, had a right to refuse to sell to those favoring the eight hour day, and so, acting for himself, had the right to dissuade others from selling. If the act were unlawful at all, it was because of the combination of a number. Gibson, J., in *Commonwealth v. Carlisle*, Bright. N. P. 39, says: "Where the act is lawful for the individual it can be the subject of conspiracy when done in concert only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public, or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence."

In the same case it is held: "A combination is criminal wherever the act to be done has a necessary tendency to prejudice the public, or to oppress individuals by unjustly subjecting them to the power of the confederacy, and giving effect to the purposes of the latter, whether of extortion or mischief. According to this view of the law a combination of employers to depress the wages of journeymen below what they would be if there was no recurrence to artificial means, on either side, is criminal." This case puts the law against the combination in as strong terms, if not stronger, than any others of our own state. The significant qualification of the general principle, as mentioned in the last three lines, will be noticed: "If there was no recurrence to artificial means, on either side." The prejudice to the public is the use of artificial means to affect prices whereby the public suffers. A combination of stockbrokers to corner a stock, of farmers to raise the price of grain, of manufacturers to raise the price of their product, of employers to reduce the price of labor, of workmen to raise the price, were at the date of that decision, at common law, all conspiracies. The fixed theory of courts and legislators, then was, that the price of every thing ought to be, and in the absence of combination necessarily would be, regulated by supply and demand. The first to deny the justice of this theory, and to break away from it, was labor, and this was soon followed by the legislation already noticed, relieving workmen from the penalties of what, for more than a century had been declared unlawful combinations, or conspiracies. ⁴²⁹ Wages, it was argued, should be fixed by the fair propor-

tion labor had contributed in production; the market price, determined by supply and demand, might or might not be fair wages, often was not, and as long as workmen were not free by combination to insist on their right to fair wages, oppression by capital, or, which is the same thing, by their employers, followed. It is not our business to pass on the soundness of the theories which prompt the enactment of statutes. One thing, however, is clear; the moment the legislature relieved one and by far the larger number of the citizens of the commonwealth from the common-law prohibitions against combinations to raise the price of labor, and by a combination the price was raised, down went the foundation on which common-law conspiracy was based, as to that particular subject. Before any legislation on the question, it was held that a combination of workmen to raise the price of labor, or of employers to depress it, was unlawful, because such combination interfered with the price which would otherwise be regulated by supply and demand; this interference was in restraint of trade or business, and prejudicial to the public at large. Such combination made an artificial price; workmen, by reason of the combination, were not willing to work for what otherwise they would accept; employers would not pay what otherwise they would consider fair wages. Supply and demand consist in the amount of labor for sale and the needs of the employer who buys. If more men offer to sell labor than are needed, the price goes down and the employer buys cheap; if fewer than required offer, the price goes up and he buys dear; as every seller and buyer is free to bargain for himself, the price is regulated solely by supply and demand. On this reasoning was founded common-law conspiracy in this class of cases. But, in this case, the workmen, without regard to the supply of labor or the demand for it, agree upon what in their judgment is a fair price, and then combine in a demand for payment of that price; when refused, in pursuance of the combination, they quit work, and agree not to work until the demand is conceded; further, they agree by lawful means to prevent all others, not members of the combination, from going to work until the employers agree to pay the price fixed by the combination. And this, as long as no force was used, or menaces to person or property, they had a lawful right to do. And, so far ⁴³⁰ as is known to us, the price demanded by them may have been a fair one. But it is nonsense to say that this was a price fixed by supply and demand; it was

fixed by a combination of workmen on their combined judgment as to its fairness; and, that the supply might not lessen it, they combined to prevent all other workmen in the market from accepting less. Then followed the combination of employers, not to lower the wages theretofore paid, but to resist the demand of a combination for an advance; not to resist an advance which would naturally follow a limited supply in the market, for the supply, so far as the workmen belonging to the combination was concerned, was by combination wholly withdrawn, and as to workmen other than members, to the extent of their power, they kept them out of the market; by artificial means, the market supply was almost wholly cut off. The combination of the employers, then, was not to interfere with the price of labor as determined by the common-law theory, but to defend themselves against a demand made altogether regardless of the price, as regulated by the supply. The element of an unlawful combination to restrain trade because of greed of profit to themselves, or of malice toward plaintiff or others, is lacking, and this is the essential element on which are founded all decisions as to common-law conspiracy in this class of cases. And however unchanged may be the law as to combinations of employers to interfere with wages, where such combinations take the initiative, they certainly do not depress a market price when they combine to resist a combination to artificially advance price.

"The reason of the law is the life of the law," and, as given in the cases cited by appellee, irresistibly impels to the conclusion that the combination here was not unlawful; a conclusion which is clearly indicated in *Commonwealth v. Carlisle*, Bright. N. P. 39, that it would not be unlawful, if there was first recurrence to artificial means by workmen to raise the market price. Here, the first step provocative of a combination by the employers was an attempt by lawful, artificial means on part of the workmen to control the supply of labor, preparatory to a demand for an advance.

Nor does the fact that the appellee was not a workman, or a member of any of the unions of workmen, put him in any better attitude than if he were. He undertook, for his own profit, ⁴³¹ to aid the cause of the workmen; his right so to do was unquestionable. But, if the employers by a lawful combination could limit his ability so to do, they did not

make themselves answerable in damages to him for the consequences of a lawful act.

The case of *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, 8 Am. Rep. 159, is not in point; it was the attempt to enforce the collection of a draft given by one member of a combination, formed to raise the price of coal, to another, in consideration of certain stipulations in the agreement. It was held that the combination, being in restraint of trade, was unlawful, and, as the draft was given in pursuance of the unlawful contract, it also was tainted with the illegality, and there could be no recovery.

But if the agreement itself were not unlawful, were the methods to carry it out unlawful? If the employers' combination here had used illegal methods or means to prevent other dealers from selling supplies to plaintiff, the conspiracy might still have been found to exist. The threats referred to, although what are usually termed threats, were not so in a legal sense. To have said they would inflict bodily harm on other dealers, or vilify them in the newspapers, or bring on them social ostracism, or similar declarations, these the law would have deemed threats, for they may deter a man of ordinary courage from the prosecution of his business in a way which accords with his own notions; but to say, and even that is inferential from the correspondence, that if they continued to sell to plaintiff, the members of the association would not buy from them, is not a threat. It does not interfere with the dealer's free choice; it may have prompted him to a somewhat sordid calculation; he may have considered which custom was most profitable, and have acted accordingly; but this was not such coercion and threats as constituted the acts of the combination unlawful: *Rodgers v. Duff*, 13 Moore P. C. C. 209; *Bowen v. Matheson*, 14 Allen, 499; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223; 40 Am. St. Rep.

On the main question, the case last cited goes further than we are called upon to go, as yet, in this state. It holds that what is not unlawful when done by an individual cannot be unlawful when done by many, and therefore the combination⁴³² not to deal with those who broke the rules of the association was not a conspiracy. For this, a number of cases from other states, as well as from England, are cited. But the law in this state has heretofore been determined otherwise from a very early day by an unbroken line of decisions which here call for no qualification; for, so far as con-

cerns the facts of this case, the legislature has so changed the law as to render these decisions inapplicable. We concede, however, that the decisions of other courts are by no means uniform. Mr. Wright, in his work on the Law of Criminal Conspiracies and Agreements (London, 1873), says: "It is conceived that, on a review of all the decisions, there is a great preponderance of authority in favor of the proposition that, as a rule, an agreement or combination is not criminal, unless it be for acts or omissions, whether as ends or means, which would be criminal apart from agreement."

Logically, the same rule would apply, as was held in *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 40 Am. St. Rep., to combinations which, although not criminal, are alleged to be unlawful.

But without regard to whether the general rule be settled by the weight of authority, as claimed by appellants, we hold here that this combination was not unlawful, because: 1. It was not made to lower the price of wages, as regulated by the supply and demand, but to resist an artificial price made by a combination which, by statute, was not unlawful; 2. The methods adopted to further the objects of the combination were not unlawful.

Another point has been most earnestly pressed upon our consideration by counsel for appellants. It is argued that under our declaration of rights either the acts of assembly of 1869, 1872, 1876, and 1891, exempting employees from the penalties of unlawful combination to fix the price of labor, are void, because, by their terms, they embrace only a particular class of citizens of the commonwealth, or their scope must be enlarged beyond the express terms of these acts, so as to include within their protection all those interested in the same subject of legislation. It is argued that it is not within the power of the legislature to declare some citizens innocent of any offense against the law; for the very same act which, when committed by some others in the same business, the law will still hold to be criminal; ⁴³³ that what the statute declares is not conspiracy in one case cannot, under the law, be conspiracy in the other; and therefore, in every contest of this kind between workmen and employers, the statute, if not void, must at least be held to operate equally to the exemption of all citizens interested in the subject affected by the combination; if there be nothing criminal in a combination to artificially raise wages, there can be nothing crimi-

nal in an employer's combination to resist the advance, or to artificially depress them.

This question is not in the case, in the view we have taken of the facts. We are at all times averse to passing on questions, the answers to which are not necessary to a decision of the case immediately before us, much less are we inclined to discuss and decide questions involving the constitutional power of a co-ordinate branch of the government. For this reason we refrain from a consideration of the able argument of counsel for appellant on this point.

The refusal of the court below to affirm appellant's seventh prayer for instructions, that, "under all the evidence, the verdict must be for defendants," was error, and, being here assigned for error, the appeal is sustained, and judgment reversed.

CONSPIRACY TO CONTROL THE WAGES OF WORKMEN.—This question is the subject of the monographic note to *People v. Fisher*, 28 Am. Dec. 507.

CONSPIRACY.—DEFINITION: See the extended note to *Spies v. People*, 3 Am. St. Rep. 474, 475; note to *Stevens v. Rowe*, 47 Am. Rep. 233.

CONSPIRACY—TEST TO DETERMINE WHETHER ACTION LIES FOR.—At common law a conspiracy cannot be made the subject of a civil action, although damages result, unless some thing is done which, without the conspiracy, would give a right of action. The true test as to whether such an action will lie is whether or not the act accomplished after the conspiracy has been formed is itself actionable: *Dels v. Winfree*, 80 Tex. 400; 26 Am. St. Rep. 755, and note; *Robertson v. Parks*, 76 Md. 118.

FOSTER v. CARSON.

[159 PENNSYLVANIA STATE, 477.]

MORTGAGES—ASSIGNMENT—NOTICE OF TO MORTGAGOR—PAYMENTS—ESTOP.

PEL.—An assignee of a mortgage to protect himself must give actual notice to the mortgagor, and a marginal record notice of the assignment of a mortgage is not such notice as to prevent the mortgagor from setting up payments by him to the mortgagee made after the assignment and before he has actual notice thereof.

MORTGAGES—NOTICE OF ASSIGNMENT—PAYMENT.—Actual notice of the assignment of a mortgage is essential to the completion of the contract relations between the assignee and the mortgagor. Until that has been given the mortgagor does no wrong in making payments to the original mortgagee.

W. K. Jennings and W. S. Thomas, for the appellant.

L. L. Davis, for the appellees.

478 STERRETT, C. J. On the trial of this *scire facias* it appeared, among other things, that the mortgage in suit was executed and delivered by the defendant Agnes J. Carson to Mary Speelman, who assigned the same on the margin of the record thereof to A. C. Jarrett, of which assignment the mortgagor had actual notice. The bond accompanying the mortgage was also assigned, by indorsement thereon, to said Jarrett, and a certificate of no defense, executed and acknowledged March 28, 1888, was delivered to him. On May 22, 1888, said Jarrett assigned, on the margin of said mortgage record, "to plaintiff, his heirs and assigns, seven hundred dollars of the moneys secured by the mortgage, with interest from January 26, 1888." Same day this assignment was noted by the recorder on the back of the mortgage. The mortgagor had no actual notice of the assignment to plaintiff until after she had paid said Jarrett the entire mortgage debt, except the sum of two hundred dollars, etc.

A verdict was taken in favor of the plaintiff, subject to the opinion of the court on the question of law reserved. The facts above stated are, in substance, those upon which the question was reserved. Judgment was afterwards entered for defendants *non obstante veredicto*, and this appeal was taken. Briefly stated, the question presented is whether the assignment of May 22, 1888, on the margin of the mortgage record, by Jarrett to plaintiff, was such legal notice to the mortgagor as precluded her from setting up payments made by her to Jarrett before she had any actual notice of said assignment.

The key to the solution of this question is in the principle 479 that the recording act was intended, not for the benefit of the mortgagor, but to provide a real security for his debt. Not being for the mortgagor's benefit, it is obviously immaterial to him whether or not the mortgage has been recorded. His creditor may or may not avail himself of his security; but the fact of record does not alter the contract relations of the parties. The undertaking of the mortgagor is to pay, and payment wherever or however made will satisfy the debt. He is under no obligation to make inquiry as to the record; and the mortgagee cannot allege an unsatisfied record in answer to a plea of actual payment.

If the debtor is under no obligation to take notice of the record of his mortgage, much less must he take notice of the assignment of it. The assignee has but an equity, and as he is bound to inquire for all the defenses which the debtor may

have, whether they appear of record or not, so he must give notice of the assignment if he would protect himself against subsequent payments made to his assignor: *Bury v. Hartman*, 4 Serg. & R. 175; *Henry v. Brothers*, 48 Pa. St. 70; *Horstman v. Gerker*, 49 Pa. St. 282; 88 Am. Dec. 501. "Legal or constructive notice, as distinguished from actual," said Mr. Justice Strong, in *Henry v. Brothers*, 48 Pa. St. 70, "is that which the law regards as sufficient to give knowledge. If the existence of knowledge is presumed from any other fact, if the presumption be *juris et de jure*, the other fact must be certain. But there is no certainty that a debtor has knowledge of the entry of a judgment against him by virtue of a warrant of attorney which he may have signed, much less that he has knowledge of the assignment of a judgment. . . . A subsequent encumbrancer or purchaser must know, for it is his duty to examine the record." The recording act imposes no such duty on a mortgagor; it is to the interest of the assignee, not his, that the assignment should be made effectual; and it would be an intolerable hardship if, every time he may wish to make a payment and obtain a credit on his debt, he should be compelled to visit the recorder's office to ascertain whether or not his mortgage has been assigned. It is therefore apparent that actual notice of the assignment is essential to the completion of the contract relations between the assignee and the mortgagor; and, consequently, until that ⁴⁸⁰ has been given, the mortgagor does no wrong in making payments to the mortgagee.

The court below was therefore right in entering judgment for defendants *non obstante veredicto*; and its judgment must be affirmed.

ASSIGNMENT—NECESSITY OF NOTICE OF ASSIGNMENT TO DEBTOR.—Down to the moment of notice, any contract which the debtor makes with the creditor, who has assigned his claim, by which the debt is extinguished either in part or in whole, is valid as against the assignee: *Gaullagher v. Caldwell*, 22 Pa. St. 300; 60 Am. Dec. 85, and note; *Richards v. Griggs*, 16 Mo. 416; 57 Am. Dec. 240; *Dodd v. Brott*, 1 Minn. 270; 66 Am. Dec. 541, and note; *Meier v. Hess*, 23 Or. 599. Notice of the assignment is required for the assignee's protection, and may be given at any time before payment by the debtor: *Muir v. Schenck*, 3 Hill, 228; 38 Am. Dec. 633, and note. Notice of the assignment of a debt given by the assignee to the wife of the debtor, and by her communicated to him, will protect the assignment against trustee process: *Holt v. Babcock*, 63 Vt. 634. This subject is fully discussed in the extended note to *Van Buskirk v. Hartford etc. Ins. Co.*, 36 Am. Dec. 475.

McHUGH v. SCHLOSSER.

[159 PENNSYLVANIA STATE, 480.]

INNKEEPERS—DUTY TO GUESTS.—A hotel guest who is annoying to other guests or the proprietor, by reason of his intoxication, may be rightfully ejected without unnecessary force or violence; but, if the disturbances caused by him are due to his sickness, he must be treated with the consideration due a sick man, and, if removed from the hotel, must be removed with the consideration due to his condition.

INNKEEPERS—REMOVAL OF SICK GUEST—DAMAGES.—In an action to recover damages for the death of a guest wrongfully removed from his hotel during his sickness, the question to be considered by the jury is not whether the exposure would surely cause death, but what consequences it was reasonable to suppose might follow such a sudden exposure of the guest in the condition in which he then was.

DAMAGES FOR DEATH—ELEMENTS OF—EVIDENCE.—While in an action to recover for death the probable earnings of the deceased are to be taken into account in fixing the damages, it is the duty of the plaintiff to show the earning power of the deceased, or give such evidence in regard to his business, business habits, and past earnings, as may afford some basis from which earning capacity may be fairly estimated. and in the absence of such evidence, it is error to charge the jury that it may, from the age, health, and habits of the deceased, estimate his earning capacity, and the pecuniary loss suffered by plaintiff.

DAMAGES FOR DEATH—MEASURE OF.—The true measure of damages for wrongful death is the pecuniary loss suffered, without any solatium for mental suffering or grief; and the pecuniary loss is what the deceased would probably have earned by his labor, physical or intellectual, in his business or profession, if the injury that caused death had not befallen him, and which would have gone to support his family. In fixing this amount consideration should be given to the age of the deceased, his health, his ability and disposition to labor, his habits of living, and his expenditures.

W. F. McCook, for the appellants.

John Marron, for the appellee.

483 **WILLIAMS, J.** The defendants are hotel-keepers in the city of Pittsburgh. McHugh was their guest, and died in an alley appurtenant to the hotel on the second day of February, 1891. Mary McHugh, the plaintiff, is his widow, and she seeks to recover damages for the loss of her husband, alleging that it was caused by the improper conduct of the defendants and their employees. An examination of the testimony shows that McHugh came to the Hotel Schlosser late on Friday night, January 30th, registered, was assigned to, and paid for, a room for the night, and retired. On Saturday and Sunday he complained of being ill, and remained most of both days in bed. A physician was sent for at his request, who pre-

scribed for him. He also asked for and obtained several drinks during the same time, and an empty bottle or bottles remained in his room after he left it. During the forenoon of Monday he seemed bewildered, and wandered about the hall on the floor on which his room was. About the middle of the day the housekeeper reported to Schlosser that he was out of his room and sitting half dressed on the side of the bed in another room. Schlosser and his porter both started in search of McHugh, and Schlosser seems to have exhibited some excitement or anger. He was found, and the porter led him to his room. While this was being done, Schlosser said to him, "You can't stay here any longer"; to which McHugh replied, "I'll git." The porter, on reaching his room, put his coat, hat, and shoes on him, and at once led him to the freight-elevator, put him on it, and had him let down to the ground floor. He then took him through a door used for freight, out into an alley some four or five feet wide that led to Penn avenue. Rain was falling, and the day was cold. A stream of rainwater and dissolving snow was running down the alley. McHugh was without overshoes, overcoat, or wraps of any description. When the porter had gotten him part way down the alley he fell to the pavement. While he was lying in the water, and the porter standing near him, a lady passed along the sidewalk on Penn avenue and saw him. She walked a square, found Officer White, and reported to him what she had seen. He went to the alley to investigate, and when he arrived McHugh had been gotten to his feet, but was leaning heavily against the wall of the hotel, apparently unable to step. ⁴⁸⁴ The porter was behind him, with his hands upon him, apparently urging him forward. What followed will be best told in the officer's own words. He says: "I asked, what's the matter with this man, Mr. Powers? He says, 'He's sick.' I says, 'He ought to have some thing done for him,' and at that time he fell right in the alley on his back. He had his coat open, no vest, and his shoes were untied. He had strings in his shoes, but not tied.' The officer was asked if the man spoke after he reached the place where he was, and he replied thus: "He spoke to me. Somebody said he was drunk. He rolled his eyes up and he says: 'Officer, I am not drunk; I am sick; I wish you would get an ambulance and have me taken to the hospital.' Then I ran to the patrol-box." It required about twenty minutes to get an ambulance on the ground. During all this time the man continued to

lie on the pavement in the alley. At length, after an exposure of about half an hour in the storm and on the pavement, the ambulance came. He was placed on a stretcher, lifted into the ambulance, and taken to police headquarters, and thence to the hospital, but all signs of life had disappeared when he was laid on the hospital floor. The *post mortem* examination disclosed the fact that the immediate cause of death was valvular disease of the heart. The theory of the plaintiff was that the shock from exposure to wet and cold in the alley had, in his feeble and unprotected condition, brought on the heart failure from which he died; and as the exposure resulted from the conduct or directions of the defendants, they were responsible for his death.

Three principal questions were thus raised: 1. What duty does an innkeeper owe to his guest? 2. What connection was there between the defendants' disregard of their duty, if they did disregard it in any particular, and the death of Mr. McHugh? 3. If the plaintiff be entitled to recover, what is the measure of her damages?

The attention of the court was drawn to the first of these questions by the defendants' third point, in which the learned judge was asked to instruct the jury, in substance, that if the deceased was troublesome to the defendants, and annoying to their guests, they might rightfully put him out of their house if they used no unnecessary force or violence. This point was refused, as framed, but the learned judge proceeded to state the rule thus: "If the annoying acts were willful, defendants ⁴⁸⁵ could remove decedent in the manner stated in point. If, however, they were the result of sickness, although they might under certain circumstances remove him, such removal must be in a manner suited to his condition." This was saying that if McHugh was intoxicated, and the disturbances made by him were due to his intoxication, he might be treated as a drunken man; but if he was sick, and the disturbances caused by him were due to his sickness, he must be treated with the consideration due to a sick man. This is a correct statement of the rule. In the delirium of a fever a sick man may become very troublesome to a hotel-keeper, and his groans and cries may be annoying to the occupants of rooms near him, but this would not justify turning him forcibly from his bed into the street during a winter storm. What the condition of the decedent really was went properly to the jury for determination. If they found the fact to be that he was suf-

fering from sickness, then the learned judge properly said that, if his removal was to be undertaken, it should be conducted in a manner suited to one in his condition.

The second question was raised by the defendant's fourth point, which was as follows: "If McHugh died of heart disease, and defendants had no reason to believe that he was so sick that his removal from the house would cause his death, they cannot be held responsible in this action, even though the mere incident of his removal from the house may have in some degree contributed to bring it on at that time." This was refused. It could not have been affirmed without qualification; but its refusal without more left the jury without any rule whatever upon the subject. The question which the defendants were bound to consider before putting the decedent out in the storm was, not whether such exposure "would" surely cause death, but, what was it reasonable to suppose might follow such a sudden exposure of the decedent in the condition in which he then was? What were the probable consequences of pushing a sick man, in the condition the decedent was in, out into the storm, without adequate covering, and when he fell from inability to stand on his feet, leaving him to lie in the stream of melting ice and snow that ran over the pavement of the alley, for about a half hour in all, in the condition in which Officer White found him?

The third question was raised by the defendant's first point. ⁴⁸⁶ No evidence was given tending to show the earning powers, or the habits of industry and thrift, of the deceased. For this reason the court was asked to instruct the jury that "nothing more than nominal damages can be recovered in this action." This was refused, and the jury was told, in the general charge, that, as the evidence fixed his age, and gave information about his health and habits, they might from this data estimate his earning capacity and the pecuniary loss of the plaintiff. Now, it is true, as said in *Pennsylvania R. R. Co. v. Keller*, 67 Pa. St. 300, that since the acts of 1851 and 1855 life has a value which the law will recognize, and which the survivors who are entitled to sue may recover at law. It is true that this value is to be fixed by the jury, in view of all the circumstances, and it is not necessarily limited to what is known as nominal damages. But it is also true that, when the probable earnings of the deceased are to be taken into account in fixing the damages, it is the duty of the plaintiff to show the earning power of the deceased, or give

such evidence in regard to his business, business habits, and past earnings, as may afford some basis from which earning capacity may be fairly estimated: *Pennsylvania R. R. Co. v. Zebe*, 33 Pa. St. 318; *Pennsylvania R. R. Co. v. Vandever*, 36 Pa. St. 298. The true measure of damages is the pecuniary loss suffered, without any solatium for mental suffering or grief; and the pecuniary loss is what the deceased would probably have earned by his labor, physical or intellectual, in his business or profession, if the injury that caused death had not befallen him, and which would have gone to the support of his family. In fixing this amount consideration should be given to the age of the deceased, his health, his ability and disposition to labor, his habits of living, and his expenditures: *Pennsylvania R. R. Co. v. Butler*, 57 Pa. St. 335; *Lehigh Iron Co. v. Rupp*, 100 Pa. St. 95; *Mansfield Coal etc. Co. v. McEnery*, 91 Pa. St. 185; 36 Am. Rep. 662. It is very clear that the refusal of the first and fourth points, without explanation, left the jury without any adequate instruction on the important questions to which these points related. The consequence was a verdict based on the earning power of the deceased, which the learned judge felt constrained to reduce, and which was unsupported by the evidence. It will not do to permit such a verdict without some evidence from which the calculation of the pecuniary loss of the plaintiff may be made.

The judgment is reversed, and a *venire facias de novo* awarded.

DAMAGES FOR CAUSING DEATH.—In an action for the death of a person caused by the wrongful act of the defendant, the basis of recovery is the proof of pecuniary damage: *Klepsch v. Donald*, 4 Wash. 436; 31 Am. St. Rep. 936, and note; *Morgan v. Southern Pac. Co.*, 95 Cal. 510; 29 Am. St. Rep. 143; *Dwyer v. Chicago etc. Ry. Co.*, 84 Iowa, 479; 35 Am. St. Rep. 322, and note. This subject is fully treated in the monographic note to *Louisville etc. Ry. Co. v. Goodykoontz*, 12 Am. St. Rep. 375.

INNKEEPERS.—RIGHT TO EJECT DISAGREEABLE GUESTS: See *Kelsey v. Henry*, 49 Ill. 488, and *Commonwealth v. Mitchell*, 2 Para. Cas. 431.

CASES

IN THE

SUPREME COURT

OF

SOUTH CAROLINA.

MONAGHAN BAY COMPANY v. DICKSON.

[39 SOUTH CAROLINA, 146.]

MORTGAGES—FORECLOSURE—EVIDENCE.—In an action to foreclose a mortgage to secure the payment of a composition with creditors a ruling that testimony given by the mortgagor in supplementary proceedings, after the execution of the mortgage, is competent against the plaintiff only to the extent of impeaching the credibility of the mortgagor after a proper foundation has been laid, is not ground for reversal when the mortgagor was a witness, and might have been examined as to all matters covered by such evidence.

EVIDENCE.—AN ATTORNEY WHO DRAFTS A MORTGAGE and signs it as a witness is entitled to testify to what occurred at the time of its execution.

APPELLATE PRACTICE—SEPARATE FINDINGS.—The fact that the trial court fails to find the conclusions of law and of fact separately is not ground for reversal on appeal unless it appears that the appellant has suffered prejudice thereby.

FRAUDULENT CONVEYANCES — MORTGAGE — COMPOSITION WITH CREDITORS.—A mortgage to secure payment of a composition with creditors is not void for fraud as against nonaccepting creditors if based upon a sufficient and valuable consideration, and executed to innocent mortgagees after an offer to the nonaccepting creditors to include them therein.

FRAUDULENT CONVEYANCES — MORTGAGE — ASSIGNMENT — PREFERENCE TO CREDITORS.—A mortgage given to secure payment of a composition with creditors, not including all of the insolvent debtor's property and security debts payable in future is not tantamount to an assignment giving unlawful preferences, and is not void under the assignment law as against nonaccepting creditors.

Perry and Heyward and Isaac M. Bryan, for the appellants.

Westmoreland and Haynsworth, for the appellees.

147 McGOWAN, J. It appears that on April 18, 1890, the defendant John D. Dickson, being embarrassed, and not able

to pay all his creditors, some of whom were pressing for security, submitted a proposition, as follows, viz: to pay thirty per cent cash, and to execute a mortgage of his real estate to secure the remainder, to be due and payable, one-half on November 15, 1890, and the other half on February 15, 1891; that all the creditors (except Ab. Kirschbaum & Co. and Carroll, Adams & Co.) agreed to the proposition, and accordingly Dickson paid thirty per cent to each of the accepting creditors, and executed a mortgage to secure the balances, payable as stated. The names of the different creditors were all set out in the mortgage, but as they were numerous, the mortgage was executed to J. H. Ligon, in trust for the different mortgagees. It was stipulated that Dickson was to remain in possession as the legal owner of the property until default of payment, etc. As stated, Ab. Kirschbaum & Co. and Carroll, Adams & Co. declined the arrangement, and sued their claims to judgment against Dickson.

Default having been made in payment of the debts secured by the mortgage, one of them, viz., "the Monaghan Bay Company," the plaintiff, for himself and the others covered by the mortgage, instituted this proceeding to foreclose the mortgage, making parties defendant the objecting creditors, who claimed to have liens upon the property mortgaged; and they, answering, charged that the alleged mortgage was void under the assignment law, for giving an illegal preference amongst creditors, and also as to creditors fraudulent and void under the statute of Elizabeth. So that it may simplify the issue to regard the objecting creditors as the real actors, seeking to set aside the aforesaid mortgage upon the grounds indicated.

The master, under order, took the testimony, and the case came on to be tried by his honor, Judge Fraser, who held upon the two grounds taken, as follows: "1. I do not see in this case on the part of John D. Dickson, the mortgagor, or any of ¹⁴⁸ the creditors secured by the mortgage, any attempt to delay, hinder, or defeat any other creditors. It was a *bona fide* transaction for a sufficient consideration to rearrange and secure certain debts, giving time for the payment. It was the fault of Ab. Kirschbaum & Co. and Carroll, Adams & Co. that they were not provided for in the mortgage. I do not think the mortgage is void for fraud. 2. This mortgage is certainly not in form an assignment. I do not see any transaction after the execution of the mortgage, or at or before its date, which, taken with its covenant, what I have held above

to be a *bona fide* security for a debt, or a sufficient consideration (a new one), make an assignment. The testimony shows that there was considerable personal property owned by the mortgagor, and not included in the mortgage. Besides this, the mortgage is in the usual form, the equity of redemption remaining in the mortgagor, and now subject to the lien of the judgments. There is now under the control of the receiver, approved by this court, certain rents not covered by the mortgage. I am not able to see that the mortgage is void under the provisions of our statutes in reference to assignments by insolvent debtors," etc. The judge ordered the mortgage foreclosed, and the lands covered by it sold and the proceeds applied.

From this decree the defendants, Ab. Kirschbaum & Co. and Carroll, Adams & Co., appeal to this court upon various exceptions, which are all printed in the record.

Exceptions 1 and 3 complain that it was error for the judge to hold that the testimony given by the defendant Dickson in another case (a supplementary proceeding), after the date of the mortgage, was competent against the plaintiff only to the extent of impeaching his own credibility as a witness in this case, by asking him what he said on the occasion referred to, etc. Dickson was on the stand in this case, and he might have been examined as to all matters covered by the excluded evidence.

Exception 2 complains of error in holding that the testimony of Mr. Haynsworth "as to the consideration on which the notes secured by the mortgage were based, and the circumstances attending the execution of the mortgage, was ¹⁴⁹ competent as tending to show good faith and a sufficient consideration," etc. Mr. Haynsworth drew the mortgage and signed it as a witness, and that entitled him to state what occurred at the time of its execution: *Spencer v. Bedford*, 4 Strob. 96; *Moffatt v. Hardin*, 22 S. C. 26, and cases there cited.

Exception 6 complains that it was error in the circuit judge not to find the conclusions of law and of fact separately. It has been repeatedly held by this court that the omission to do so is not good ground for reversal, unless it is made to appear that the appellant has suffered prejudice thereby, as to the merits of the case, which was not done in this case. We think, however, that the practice is a good one, as tending to prevent confusion and to promote clearness: See *Briggs v. Briggs*, 24 S. C. 379, and authorities cited.

All the other exceptions in different form charge error on the part of the circuit judge in his findings of fact and rulings of law. 1. As to the allegation that the mortgage is void for fraud. The judge found that, as a matter of fact, it was a *bona fide* transaction for a sufficient consideration to rearrange and secure certain debts, giving time for the payment, etc. The rule of this court as to the findings of the circuit judge is well known. We cannot say that this finding is unsustained by the testimony. In order to make out a case of actual fraud, so as to set aside a mortgage, it is necessary to show concurrence in the fraudulent act by the mortgagee as well as by the mortgagor. There was here no proof of combination with the mortgagees, for most of them were not present, and had nothing to do with procuring the execution of the mortgage. But did the mortgagor himself intend to defeat, delay, or hinder the other creditors, further than was the incidental effect of securing those who had accepted his proposition? There is no evidence to that import, for the debtor, before executing the mortgage, gave the appellants notice of the proposed arrangement, which they declined. Suppose Dickson, instead of including a number of creditors in the mortgage, had executed it to one single creditor, can there be any doubt that, under our decisions, it would have been sustained? "Where a mortgage is based upon a valuable consideration, and is not taken ¹⁵⁰ for the purpose of hindering, defeating, and delaying the other creditors, it is not void under the statute of Elizabeth, even though the mortgagor is insolvent, and the mortgage embraces all the debtor's visible property," etc: *Magovern v. Richard*, 27 S. C. 272. This being so as to a mortgage to secure a single creditor, we cannot see why the same reason should not apply to a mortgage to secure *pro rata* a number of creditors, only with increased force. 2. But it is contended that the mortgage is really an assignment for the benefit of creditors, and as such is void for giving preference to some creditors over others. If the paper must be construed as substantially an assignment, it is very clear that it would be void, as in violation of the inhibition in our assignment law against preferences. But the question lying back of that is, whether it is an assignment for the benefit of creditors in the sense of the act. As was said in the case of *Verner v. McGhee*, 26 S. C. 250: "As we conceive, the assignment act has no application, unless there is an actual assignment or a state of facts fully proved, which in conscience and

equity are tantamount to an assignment with unlawful preference." This paper here is not in form an assignment, but a mortgage. And the question, therefore, is whether a state of facts has been shown which, in conscience and equity, are tantamount to an assignment. Upon this subject the circuit judge held that the mortgage was not tantamount to an assignment, and void under the provisions of our statutes in reference to assignments by insolvent debtors, and decreed foreclosure in favor of the mortgagees. The finding of the court below upon a question of fact will not be disturbed unless it is against the weight of the evidence. The mortgage did not include the whole of the debtor's property, nor did it accomplish the leading purpose of an assignment, which is to transfer the title to the estate; but the debtor stipulated to "retain and enjoy the said premises as his own until default of payment should be made," as in the case of a mortgage given as a security. We cannot say that the finding of the circuit judge was error. "An ordinary mortgage executed by an insolvent debtor, with intent to secure and prefer one creditor over others, and covering a large portion of his property, ¹⁵¹ is not void under the assignment act": *Magovern v. Richard*, 27 S. C. 272.

The judgment of this court is that the judgment of the circuit court be affirmed.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—PREFERRING CREDITORS.—Chattel mortgages executed at the same time by an insolvent debtor to certain of his creditors, giving them priority, but not allowing them to prorate, if made in good faith to secure *bona fide* debts will not constitute a fraudulent assignment for the benefit of the creditors preferred as against those not preferred, although such mortgages cover all the assets of the mortgagor: *Hershiser v. Higman*, 31 Neb. 531; 28 Am. St. Rep. 527, and note; *First Nat. Bank v. Ridenour*, 46 Kan. 718; 26 Am. St. Rep. 167, and note. See the extended notes to *Winner v. Hoyt*, 57 Am. Rep. 262.

ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS.—Where an attorney at law prepares and writes an order for the defendant to sign, which the defendant subsequently swears that he did not sign, such attorney is a competent witness to prove its execution by the defendant: *Rahm v. State*, 30 Tex. App. 310; 28 Am. St. Rep. 911, and note. An attorney employed merely as a scrivener to draw up a deed may testify concerning what comes to his knowledge in connection with the transaction: *De Wolf v. Strader*, 26 Ill. 225; 79 Am. Dec. 371, and note. *Contra*: *Bank v. Mersereau*, 3 Barb. Ch. 523; 49 Am. Dec. 189, and note. A conversation between two persons in the presence of an attorney employed by them to prepare a paper in connection with the subject of the conversation is not privileged: *House v. House*, 61 Mich. 69; 1 Am. St. Rep. 570, and note; *Goodwin Gas Stove etc. Co's Appeal*, 117 Pa. St. 514; 2 Am. St. Rep. 696.

JOHNS v. CHARLOTTE, COLUMBIA, AND AUGUSTA RAILROAD COMPANY.

[39 SOUTH CAROLINA, 162.]

RAILROADS—NEGLIGENCE—EVIDENCE TO ENHANCE DAMAGES.—In an action to recover damages for personal injuries received through the negligence of a railway company plaintiff may testify as to the number and character of his family if the law of punitive damages is given in the charge to the jury.

RAILROADS—NEGLIGENCE—EVIDENCE.—In an action to recover damages for an injury caused by falling through an open trestle alleged to have been left unguarded in a grossly negligent manner by a railroad company, the engineer who built the trestle is competent to testify as to the time, manner, and purpose of its construction, as well as that of surrounding structures.

RAILROADS—APPROACHES TO DEPOTS.—As to passengers or persons with a *bona fide* intention of taking a train, railroad companies are required to exercise an extraordinary degree of care in making and keeping up safe approaches to their passenger depots.

RAILROADS—NEGLIGENCE—STATION APPROACHES.—A railway carrier is liable for negligence in its construction or maintenance in repair of its station approaches, station buildings, and station platforms, and for its failure to adequately light them.

RAILROADS—DEPOT APPROACHES—NEGLIGENCE.—A railway company holding out an invitation to persons wishing to take passage in its cars by day or night, to reach such cars, and embark thereon, by crossing a high trestle used as a bridge, is required to exercise extraordinary care to prevent injury to such persons, and is liable for slight negligence.

B. L. Abney, for the appellant.

S. P. Hamilton, for the appellee.

166 *McGOWAN, J.* This was an action to recover damages for personal injuries received by the plaintiff, a traveling salesman, on the 30th of November, 1889, at Chester, South Carolina, while he was approaching at night the passenger depot of the Charlotte, Columbia, and Augusta railroad, by stepping into an open trestle on the main line of the Chester and Lenoir narrow-gauge railroad. There is no "case stated," but a plat is attached to the record which describes the premises. Counsel for the appellant states the facts as follows: "It seems that some time prior to 1883 the Chester and Lenoir Narrow-Gauge Railroad Company had built a railroad from Chester to some point north of that place. Its line of road ran east of that of the Charlotte, Columbia, and Augusta railroad, and parallel thereto, until it crossed the street in front of Nicholson's Hotel. It does not clearly appear how the track of the narrow-gauge road was built along this line,

and whether it obtained its right of way by condemnation, grant, or license. It does appear, however, that the Charlotte, Columbia, and ¹⁶⁷ Augusta Railroad Company operated the narrow-gauge railroad in 1883, and that a trestle was made from the street to a point north of the depot. The statutory right of way of the Charlotte, Columbia, and Augusta Railroad Company is sixty-five feet from the center of the track each way, and that this trestle is within this right of way. Under what arrangements and proceedings this trestle and line of track was put within or on the sixty-five feet right of way does not appear. The defendant company ceased to operate, or to have any thing to do with or to control, the Chester and Lenoir railroad after the 1st of May, 1886. The trestle was on the main line of the Chester and Lenoir railroad. From 1886 to, and at the time of, the accident, the Richmond and Danville Railroad Company managed and controlled this road under a lease.

"At the time this trestle was built the passenger depot of the defendant company was located near the street, and the rear of it abutted against the trestle. Subsequently the passenger depot of the Charlotte, Columbia, and Augusta Railroad Company was removed to its present location. After this was done the Richmond and Danville Railroad Company built along the trestle a plankway, which is from four to ten feet deep along its whole length, and about ten inches between each crosstie." This plankway, or platform, was put there, as stated by one of the witnesses, "in order to combine the depot for the use of the two railroads."

"On the morning of November 30, 1889, the plaintiff, about three o'clock, A. M., and his companion, Mr. Murphy, were awakened by the hotel porter, for the purpose of taking the train on the railroad of the defendant company. It seems that they did not have time themselves to get ready and purchase their tickets, and they sent the porter out in advance to purchase them. After they had dressed they proceeded to the train themselves; they passed out of the hotel, down the steps, and advanced towards the city lamps in the street, on or across the track of the Chester and Lenoir narrow-gauge, instead of proceeding forward to the Charlotte, Columbia, and Augusta railroad, and going down to the place where passengers are received on trains on that road. They observed a light shining out of a window in the passenger depot, and started across the platform to reach the place where the cars

were usually stopped. Instead, however, of going over ¹⁶⁸ the plankway they advanced to the head of the trestle, and plaintiff stepped in between the first and second crossties, and was injured," etc. It does not appear whether the porter, who had gone in advance, had purchased the plaintiff's passenger ticket at the moment that he fell into the open trestle and was injured. He complains that he was very seriously injured in his foot and ankle, "caused by the gross negligence of the defendant company, in allowing the said open and dangerous trestle to remain unguarded in the way of passengers going or returning from its passenger trains, in not keeping lights near said trestle, and in not providing a safe approach in that direction to its station, where passengers alight from and get on said train."

Under the charge of the judge, and after they, in charge of an officer, had inspected the locality where the injury was received, the jury found a verdict of thirteen hundred dollars for the plaintiff, upon which judgment was entered; from which the defendant company now appeals to this court upon various grounds, embracing alleged errors of rulings at the trial, in granting certain requests to charge, and in refusing others. The requests especially are long, and as they are all printed in the brief they need not be here stated again.

Exceptions 1 and 2 [to the rulings] were withdrawn at the trial by the appellant. Exception 3 alleged error in the ruling of the judge, "in allowing the plaintiff to testify, over the objection of the defendant, how many people he had to care for, and of whom they consisted." If the testimony had gone further in the line indicated it might have become error; but as it stopped simply at the number and character of his family, we think it was wholly immaterial, and could not affect the result, especially as the judge charged as follows: "Now, in a case where the railroad company was guilty of any gross and reckless disregard of the lives and persons of people, juries are allowed to give what you call punitive damages—go beyond actual damages, and give damages by way of punishment. Gentlemen, while that is a matter for you, I charge you that it is not proper, unless in a clear case of willful, palpable disregard of their duty, to apply that degree ¹⁶⁹ of responsibility," etc: See *McLaurin v. Wilson*, 16 S. C. 402; *Thompson v. Brannan*, 14 S. C. 543.

Exception 4 complains of error on the part of the judge, "in allowing the witness Bernard to testify, over the objec-

tion of the defendant, as to the *locus* and occurrences with reference thereto long prior to the accident to the plaintiff, and also to the condition of affairs at other and different places on defendant's platform and track than where the accident occurred," etc.

It seems that when the testimony of this witness was offered, objection was made, but overruled; that no exception was noted at the time, and the plaintiff, under the authority of *Thompson v. Brannan*, 14 S. C. 542, now objects that the appellant having acquiesced, cannot renew the matter in this court. But as the objection was included in the written exceptions, we will consider it. The witness, Thomas Bernard, was the engineer under whose direction the trestle so often spoken of was built, and, as it seems to us, was the very person best calculated to inform the court when the trestle extending the narrow-gauge track was built on the right of way of the Charlotte, Columbia, and Augusta company—for what purpose it was built, and by whom—and also as to when the new depot of the Charlotte, Columbia, and Augusta company was erected, and for what purpose the plankway, or platform, was laid along that open trestle. We have read the testimony of the witness carefully, and we must say that we agree with the circuit judge, that the testimony was entirely relevant to the issues and unobjectionable.

That brings us to what the parties consider the main question in the case, and that is as to what degree of care is required of railroad carriers in making and keeping up safe approaches to their passenger depots. The judge charged as follows: "It is contended for the plaintiff that extraordinary care is required; that more than ordinary care is required under the circumstances. On the other hand, on the part of the defendant company, it is said that the railroad company, under the peculiar circumstances of this case, were not required to exercise any thing more than ordinary care and prudence, such care as would be required by your own town council, in keeping dangerous objects off the streets, and such
170 care as would be required by a private person, not to allow any dangerous objects to stand in the way of ingress to his house, where people were invited—that is, such care as a man of ordinary prudence would exercise. Now, in this contention, I charge you that, in regard to passengers, the railroad company is to be held to extraordinary care—extraordinary care providing for the safety of passengers."

Was this error of law? As a general rule, it certainly was not. It is so well established that the citation of authorities is entirely unnecessary. But when does that responsibility on the part of the railroad company arise? It is contended in behalf of the company that this extraordinary liability is imposed upon a railroad carrier of passengers for the reason that the operation of engines and cars by the power of steam is dangerous, and therefore cannot commence until the passenger has purchased his ticket and taken his seat in a coach to be transported; for up to that moment, as contended, he is in no peculiar danger, and therefore he is entitled to nothing more than ordinary care; that the carrier's liability in respect of the condition of his premises, approaches, and platforms is neither greater nor less than that of one person to another, who, by invitation or inducement, express or implied, has come upon his premises for the purpose of transacting business. Some cases were cited, which seemed to recognize the distinction indicated, but we think that it is not well founded—that it would be impossible to maintain such an arbitrary and shadowy line, and that the great weight of authority is against it, holding that the liability of the carrier arises as soon as there is a contract of carriage between the parties. The judge left it to the jury to determine whether the plaintiff's ticket had been purchased at the moment he received his injury; and we might assume from their verdict that it had been so purchased. "The relation of carrier and passenger begins when a contract of carriage having been made, or the passenger having been accepted as such by the carrier, he has come upon the carrier's premises or has entered upon any means of conveyance provided by the carrier," etc. "If a person has the *bona fide* intention of taking passage by a train, and if he goes to a station at a reasonable ¹⁷¹ time, he is entitled to protection as a passenger, not only from the moment he enters upon the carrier's premises, but also while en route to the station in an omnibus run by the railway to take passengers to their trains": 2 Am. & Eng. Ency. of Law, 744, and notes.

But, according to the judge's charge, it was immaterial whether the ticket had or had not been purchased at the moment the injury was received. The judge said: "There has been some contention between these parties as to whether these parties were 'passengers' or not. That is a question of fact for you. Mr. Abney, for the defense, argued that the

relation of passenger and carrier had not been established at the time this accident occurred; that these parties were not in the actual custody and care of the defendant company at the time the accident happened. Well, in regard to that, I will say this: That the relation of a passenger to the company would commence, certainly, from the purchase of the ticket, with the immediate purpose of taking the cars as soon as they were ready on the track. It has been argued on one side that the evidence shows that their tickets had been procured by the hotel porter, whom they made their agent, and claim that they were passengers; but I think this extraordinary care would be required of the railroad authorities as to any person who was going in the proper way, by any proper approach, to take the cars, or to purchase a ticket, or to get his baggage checked; that if he got on the property of the railroad, that he had the right to find every thing that was necessary for the railroad to have done to secure his safety," etc.

It seems to us that this was not error, but in exact conformity to the doctrine of the elementary writers as well as of the decided cases. "A carrier is liable for negligence in its construction or maintenance in repair of its station approaches, station buildings, . . . and station platforms": Pierce on Railroads, 275, 276, and notes. "A carrier is also liable for a failure to adequately light its stations and platforms, and for negligent obstructions on station platforms," etc: 2 Am. & Eng. Ency. of Law, title "Carriers," p. 760, and notes, especially note 4. See the charge of Maule, J., to the jury, as ¹⁷² reported in *Martin v. Great Northern Ry. Co.*, 16 Com. B. 179, and also the judgment of Dillon, Justice, in *McDonald v. Chicago etc. R. R. Co.*, 26 Iowa, 124, 96 Am. Dec. 114, and the note of Judge Redfield to the last-cited case in 2 Redfield's Railway Cases, 532.

The judgment of this court is, that the judgment of the circuit court be affirmed.

POPE, J. I shall not undertake to state anew the facts upon which this contention is based. The opinions of the senior members of this court have already set them forth clearly and distinctly. I would content myself with a general concurrence in the opinion of Mr. Justice McGowan, if it were not the fact that, in my judgment, it should be considered as applying to the facts of this case, and not, as a general rule, applicable to all sets of cases where accidents occur

by reason of defective approaches to stations at which passengers board railroad trains for passage thereon. In my judgment, railroad companies should not be held responsible for extraordinary care in making and keeping in repair such approaches to stations for passengers, except in those instances where bridges or trestles on their property are used as a part of such approaches which such railroads use in the approaches to such stations, and over which they invite passengers to enter their property for the purpose of taking passage in their cars. In the case at bar it is admitted that the railroad company in question invited persons wishing passage in its cars, by day and by night, to reach their cars, to embark thereon, by crossing a trestle ten feet high, with a flooring upon such trestle so open that the plaintiff fell through the same, thereby inflicting serious wounds and bruises. Using this trestle as a bridge, the railroad company, in my judgment, were required to exercise extraordinary care to prevent injuries. This was not done. The flooring was not only not close, but no lamps were lighted. They should respond in damages for such negligence.

With these restrictions upon the application of the doctrine of extraordinary care, I concur in the opinion of Mr. Justice McGowan.

MR. CHIEF JUSTICE McIVER dissented, on the ground: 1. That the testimony of the witness Bernard, tending to show negligence on the part of the defendant company at places and times other than that where the accident which was the subject of inquiry occurred, was not admissible; 2. That in cases like the present one all that is required of a railroad company is, to exercise ordinary care in providing reasonably safe approaches to its cars.

RAILROADS—DEPOT APPROACHES, DUTY TO KEEP IN SAFE CONDITION.—It is the duty of a railway company to keep a recognized way to and from its depot in a reasonably safe condition for the passage of the public: *Cross v. Lake Shore etc. Ry. Co.*, 69 Mich. 363; 13 Am. St. Rep. 399, and note; *Delaware etc. R. R. Co. v. Trautwein*, 52 N. J. L. 169; 19 Am. St. Rep. 442, and note; *Moses v. Louisville etc. R. R. Co.*, 39 La. Ann. 649; 4 Am. St. Rep. 231, and note; *Alabama etc. R. R. Co. v. Arnold*, 84 Ala. 159; 5 Am. St. Rep. 354, and note; *White v. Cincinnati etc. Ry. Co.*, 89 Ky. 478; *Collins v. Toledo etc. Ry. Co.*, 80 Mich. 390; *Cole v. Lake Shore etc. Ry. Co.*, 81 Mich. 156; *Burnham v. Wabash etc. Ry. Co.*, 91 Mich. 523.

WOODWARD v. WOODWARD.

[89 SOUTH CAROLINA, 259.]

JUDGMENT LIENS—REVIVAL—RIGHTS OF PURCHASER.—The lien of a judgment revived within the time allowed by statute, after its expiration by limitation, cannot relate back so as to defeat the title of a *bona fide* purchaser of the debtor's property between the date when the original judgment lien expired by limitation and the revival thereof.

JUDGMENT LIENS—REVIVAL—RIGHTS OF INTERMEDIATE PURCHASERS.—The revival of a judgment and of its lien which has expired by limitation is subject to the rights of *bona fide* purchasers or encumbrancers without notice acquired during the suspension of such lien.

Henderson Brothers, for the appellant.

Croft and Chafee, for the appellee.

260 MCGOWAN, J. Joshua Madison Woodward died intestate in 1889, and this action was instituted by his heirs to partition his estate. He was seised of an undivided half interest in a certain tract of land, his brother, D. Hagood Woodward, being seised of the other moiety thereof.

It seems that the rights of all the parties have been adjusted, except the conflicting claims of D. Hagood Woodward on the one part, and George W. Croft and S. H. Meyers on the other part, as to the interest in the share of one of the heirs of the estate, viz: J. L. Woodward, against whom Meyers and Marcus had a judgment, which was entered on October 6, 1880, upon which execution was issued and returned *nulla bona* within three days thereafter. Another execution was issued on October 16, 1882, and returned *nulla bona* on July 20, 1885. This judgment was revived by order of Judge Wallace on October 9, 1891, so as to have "the force, form, and effect of the former recovery." Accordingly, under this judgment thus revived, the interest of the said judgment debtor, J. L. Woodward, was duly sold and conveyed by the sheriff of Aiken county, on sales day in January, 1892, to G. W. Croft and S. H. Meyers, who claim the interest of the said judgment debtor in the land by virtue of the sheriff's deed. This claim of title was contested by D. Hagood Woodward, a brother of the judgment debtor, who claims that he has title to the said land by virtue of a deed of conveyance from his brother, the judgment debtor, bearing date August 18, 1891. Under this state of facts the question was whether the alienee of the judgment debtor should prevail against the sheriff's deed, for the reason that the debtor sold and conveyed the land

in the interval of time between October 5, 1890, when the ten year lien on the judgment expired, and October 9, 1891, when the judgment was "revived"; upon the ground, as insisted, that during that interval of time there was no active living lien which authorized a levy and sale by the sheriff.

²⁶¹ His honor, Judge Witherspoon, held as follows: 1. That the judgment obtained October 5, 1880, by Meyers and Marcus against Joshua L. Woodward, created a lien from the date of its entry for the period of thirteen years; 2. That the defendants G. W. Croft and S. H. Meyers, as purchasers at sheriff's sale under said judgment, acquired the undivided interest of Joshua L. Woodward in the real estate sought to be partitioned in the above-entitled action; 3. That against the aforesaid judgment the judgment debtor, Joshua L. Woodward, is entitled to the homestead exemption as provided under the constitution of 1868."

From this judgment D. Hagood Woodward appeals to this court on the following grounds: 1. That his honor erred in holding as matter of law "that the judgment obtained October 5, 1880, by Meyers and Marcus against Joshua L. Woodward created a lien from the date of the entry for the period of thirteen years"; whereas he should have held that said judgment only created a lien for ten years from such entry; 2. That his honor erred in finding as a matter of law "that the defendants G. W. Croft and S. H. Meyers, as purchasers at the sheriff's sale under said judgment, acquired the undivided interest of J. L. Woodward in the real estate sought to be partitioned"; whereas he should have held that the defendant D. Hagood Woodward acquired a valid title to said land by virtue of his deed from J. L. Woodward, when said judgment had lost its lien; 3. That his honor erred in not finding as matter of law that the undivided interest of J. L. Woodward in the land in question claimed by Joshua L. Woodward, and deeded by him to D. Hagood Woodward on August 18, 1891, was then exempt as the "homestead" exemption of Joshua L. Woodward, and as such passed under his deed to his brother, and was not subject to attachment, levy, and sale; 4. That his honor erred as matter of law in declaring as unconstitutional that portion of the homestead act of December 24, 1880, which applied its provisions of exemption to any judgment obtained upon any right of action arising subsequent to the ratification of the constitution of the state.

Section 310 of the code declares that "final judgments entered ²⁶² in any court of record in this state subsequent to the twenty-fifth day of November, 1873, shall constitute a lien upon the real estate of the judgment debtor in the counties where the same are entered, for a period of ten years from the date of entry of such judgments. . . . *Provided*, however, that the plaintiff in such judgments may at any time in three years after the active energy has expired revive the judgment with like lien as in the original, for a like period, by service of a summons on the debtor, as provided by law, requiring him to show cause, if any he can, at the next term of the court for his county, why such judgment should not be revived; and if no good cause be shown to the contrary, then it shall be decreed that such judgment is revived according to the force, form, and effect of the former recovery," etc. This provision of law, especially the peculiar proviso, has given rise to some novel questions. This court has had occasion to interpret it in some particulars, but new questions still arise.

In the case of *King v. Belcher*, 30 S. C. 381, it was held that subdivision 2 of the amending act of 1885 did not have retrospective effect, so as to repeal the proviso of the section as to judgments entered after 1873 and before 1885. But as to all such judgments, the plaintiff might revive at any time within the three years of grace allowed. In the case of *Ex parte Witte Brothers*, 32 S. C. 226, it was held that the plaintiff might revive his judgment during the running of the original ten years, with the effect, not of creating a new and independent judgment, but of reviving an old one, with a like lien of ten years; and this revived lien, having been created before the expiration of the first ten years, of course connected with it, giving a continuous and unbroken lien during the new life of the revived judgment.

As we understand it, the summary proceedings to revive a judgment is in the nature of a *scire facias*, which, it is well understood, is not a new suit, but the continuation of an old one: See Freeman on Judgments, secs. 343, 344. The authority to issue an execution on a revived judgment is based on the original judgment, which, being revived, retains its relative rank as to other liens. It is therefore clear, that as to ²⁶³ the original parties to the judgment, the plaintiffs in the judgment had a lien upon all the property of the judgment debtor then owned or to be thereafter acquired by him, from

the date of the original judgment, October 5, 1880, to the expiration of the original lien of ten years (1890); that they had the right to revive at any time within the original ten years and the three years additional, with the effect of creating a revived lien with like effect as in the original and for a like period, which lien they still have upon all the real estate of the defendant in execution down to the present time.

Conceding this, however, it is claimed that the case at bar raises a new question, which is now for the first time before this court; that this is not a case between the original parties to the judgment, like that of *Ex parte Witte Brothers*, 32 S. C. 226, but that the rights of a third party have intervened; that D. Hagood Woodward purchased the property in question from the judgment debtor on August 18, 1891, during the break in the lien from October, 1890, to the revival of the judgment on October 9, 1891; and that as to such purchase by a stranger to the record, the lien of the revived judgment could not relate back to the time of such purchase, so as to avoid the title of the purchaser for value. This is the precise point of the case, and is truly a new question in this state. The principle involved has been much discussed elsewhere. The cases upon the subject are not entirely in accord. But, as we think, the weight of authority, upon the facts as stated, supports the claim of the *bona fide* purchaser without notice, after the active energy of the judgment has been lost and before revival.

Mr. Freeman, at section 379, says a judgment may, through various circumstances, seem to be no longer of any force or effect, and may afterwards, by virtue of some judicial proceedings, be restored to its former condition. From its inseparable connection with the judgment the lien may seem first to lose and then to regain its vitality. The restoration of the judgment and of its lien are always subject to the rights acquired during their temporary suspension. The same distinguished author, at page 381 of his book on Judgments, says: "The vacation of a judgment by order of the court, like its extinguishment by ²⁶⁴ the operation of a forthcoming bond, leaves the judgment debtor at liberty to dispose of and encumber his real estate, as if the judgment had never been rendered. Upon a reversal of the order of vacation the judgment creditor is restored to all his rights, except so far only that his restoration cannot prejudice persons not parties to the suit, in relation to any interest they have acquired dur-

ing the vacation. But liens existing in subordination to that of the judgment at the date of its vacation will occupy a like subordinate position after its restoration. "When the order vacating a judgment is set aside the lien is revived in all its pristine rigor, and is as effective as before the order was made, except as to rights acquired in the mean time. . . . So if a judgment be satisfied by the sale of property, the vacation of the sale revives the judgment, so that it has precedence over junior judgment liens, which accrued prior to the vacating of the sale. Generally, the revival of a judgment operates prospectively only, and does not impair conveyances made prior to such revival," citing *King v. Harris*, 34 N. Y. 330, and *Coombs v. Jordan*, 3 Bland, 284, 22 Am. Dec. 236.

This latter case cited was well and fully considered, giving the history of liens upon real estate from the earliest times. Among other things, he condemned the doctrine we are considering as follows: "And therefore if a plaintiff, after the time allowed for suing out execution, revives his judgment, his attendant lien can only operate prospectively, and not with any retrospective effect, so as to overreach any intermediate encumbrances or alienations; for although, as between the parties to the judgment when revived, it may be permitted to operate as a lien upon the property of the defendant from its date; yet as a legal relation is never suffered to work a wrong, it cannot be permitted to bind the property as against any intermediate encumbrancer or *bona fide* purchaser without notice, but from the date of its revival," citing a number of authorities. "And so, too, as to deeds, to the validity of which recording is necessary, the recording of them after the time prescribed is not allowed to affect by relation the rights and interests of intervening purchasers or creditors," etc. It seems that the doctrine, as to the effect of a revival under the circumstances stated, ²⁶⁵ leaves untouched the rights of the parties to the judgment and the relative rank of all liens acquired before the judgment lost its active energy, and protects only the rights of innocent third parties; in the view as stated, "that it would be against principle, and work manifest injustice, to give to it this retrospective operation, so as to extinguish the intermediately acquired rights of third persons."

From the view which the court takes as to the first question, it will not be necessary to consider the second, as to the right of the judgment debtor to a homestead in the premises, which is the subject of the contention.

The judgment of this court is, that the judgment of the circuit court be reversed, and the case remanded for such further proceedings as may be considered necessary to carry out the conclusions herein announced.

Mr. Chief Justice McIVER and Mr. Justice POPE concurred in the result.

JUDGMENT LIENS—REVIVAL—EFFECT OF.—The lien can operate only prospectively after the revival of a judgment, and not so as to overreach any antecedent alienations or encumbrances: *Coombs v. Jordan*, 3 Bland, 284; 22 Am. Dec. 236; *Bank v. Wells*, 12 Mo. 361; 51 Am. Dec. 163. A judgment lien is not extended beyond ten years by a revival of the judgment within the ten years, as against a *bona fide* mortgage lien accruing after the docketing and before the revival: *Mower v. Kip*, 6 Paige, 88; 29 Am. Dec. 748, and note. A purchaser of land having notice of a judgment against the vendor, of which the lien has expired by the running of the statutory period, is not necessarily a purchaser *mala fide* within the meaning of the statute, so as to be affected by the lien notwithstanding the efflux of time: *Pettit v. Shepherd*, 5 Paige, 493; 28 Am. Dec. 437, and note.

BICKLEY v. COMMERCIAL BANK.

[39 SOUTH CAROLINA, 281.]

BANKS—CERTIFICATE OF DEPOSIT—PAROL EVIDENCE TO VARY.—When, in an action against an incorporated bank to recover money deposited therein, it appears that the money was paid to the president of the defendant bank, who had previously been manager of a private bank, and who gave the plaintiff a certificate of deposit signed by him as "manager," certifying that the plaintiff had "deposited with him as manager" the sum claimed, but in no way referring to any bank, parol evidence is not admissible to show that such bank president assured the plaintiff depositor at the time that the money would be deposited with the defendant bank, and that the certificate was intended as evidence of such fact, in the absence of proof that such bank president had authority to receive deposits or make such contract, or had ever been designated or had signed his name as manager of the defendant bank. Nor does the fact that the action is not brought on the certificate render such evidence admissible, because as soon as it appears that the contract is in writing the parties are limited to the written evidence of its terms.

BANKS—CERTIFICATE OF DEPOSIT—PAROL EVIDENCE TO VARY.—A certificate of deposit promising to repay a certain sum of money at a time stated, with interest at a specified rate, cannot be explained or varied by parol evidence.

EVIDENCE—PRODUCTION OF PAPERS.—When a written instrument, such as a certificate of deposit, forming the basis of a cause of action, is in court, it may be called for without notice to produce, and evidence of payments of interest on such certificate is admissible to contradict testimony that the defendant had never paid interest on such certificates.

BANKS—LIABILITY ON CERTIFICATE OF DEPOSIT.—When, in an action against an incorporated bank to recover money paid to its president, who gave the depositor a certificate of deposit signed by him as “manager,” certifying that the depositor had deposited with him as “manager” the sum claimed, but in no way referring to any bank, the defense is that the money was deposited to the credit of such bank president as “manager,” and not to the credit of the plaintiff, it is error to charge that if it was paid to such president to be deposited in his bank, and was so deposited, the bank is liable, though it was not his duty to receive deposits, without qualifying the charge to the effect that such bank would be liable only in case the money went into its custody and control as the money of plaintiff.

BANKS—LIABILITY ON CERTIFICATE OF DEPOSIT.—When, in an action against an incorporated bank on a certificate of deposit to recover the sum named therein, there is nothing on the face of such certificate to show that the bank is liable for the amount, except that it is signed by the president of such bank as “manager,” the word “manager” after his name is not evidence that he had authority, or was contracting for the bank, in receiving the deposit.

BANKS—DEPOSITS—AUTHORITY TO RECEIVE—BURDEN OF PROOF.—In an action against a bank to recover a deposit paid to its president as “manager,” the burden of proof is upon the depositor to show that such president has authority, express or implied, to receive deposits, and that the deposit in suit was actually received by the bank as the money of the plaintiff depositor.

NEW TRIAL—PRACTICE.—Refusal to grant a new trial on the facts is not ground for review on appeal.

ACTION to recover money alleged to have been deposited in bank. Judgment for plaintiff and defendant appealed, assigning, among others, the following errors: “7. Because, in his charge to the jury, that ‘if the money was handed to Mr. Iredell to be deposited in the Commercial Bank of Columbia, South Carolina, and was so deposited, and went into the custody and control of the defendant bank, the bank would be liable, notwithstanding it was not one of the duties of the president to receive deposits,’ etc. His honor did not qualify the charge by any addition to the effect that the bank would be liable only in case the money went into its custody or control as the money of the plaintiff; 8. Because his honor charged the jury that if they believed ‘from the evidence that Mr. Iredell, the president of the defendant bank, asserted at the time the deposit was made, or the money was left with him, that the certificate delivered to the plaintiff was the certificate of the bank, and that the bank would be responsible therefor; and that this assertion was made under circumstances which would, in his opinion, give the plaintiff a right to believe that it was an acknowledgment

of the bank, of which he was then president, and that it was with that bank the money was deposited, and with which the plaintiff was then dealing, and that the plaintiff was not dealing with him individually, and the plaintiff did at the time believe that such certificate was the acknowledgment and act of the defendant bank, then I charge you that the defendant is liable therefor'; 9. Because his honor did not, upon the request of the defendant, qualify his charge, 'that the principal is liable to third persons for the frauds, deceits, concealments, and misrepresentation of his agent in the course of his employment,' by the statement that it was only for the frauds of such agent in the conduct of the business committed to him; 10. Because his honor refused defendant's first request to charge 'that the ordinary duties of a president of a bank do not authorize him to receive deposits, and the depositor who leaves his money with the president of a bank is not entitled to recover the amount from the bank, unless it is further shown that the money was actually received by the bank to the credit of the depositor, or that the president was specially authorized to receive deposits'; 11. Because his honor refused to charge defendant's second request, 'that if the jury believe that the Bickley money was placed by Captain Iredell to his credit as manager of the old bank it cannot be said to have reached the bank as the money of the plaintiff'; 12. Because his honor refused defendant's fifth request to charge 'that there is nothing on the face of the instrument sued on in this case to show that the defendant is responsible for the amount, and the word "manager" after his name does not of itself indicate that he was contracting for the new bank'; 13. Because his honor refused defendant's sixth request to charge 'that if the jury believe that Captain Iredell did tell the plaintiff that the "bank" would be responsible for the money, if he understood, or should have understood, the reference to be to the old bank, the jury cannot find for the plaintiff'; 14. Because his honor refused to charge defendant's seventh request, 'that the burden is upon the plaintiff to show that the president of the bank had the authority to receive deposits'; 15. Because his honor refused defendant's motion for a new trial, upon the ground that the verdict was contrary to the law and the evidence."

Lyles and Muller, for the appellant.

J. S. Verner, for the appellee.

288 McIVER, C. J. The action in this case was brought by the plaintiff to recover from the defendant the sum of eight hundred dollars, besides interest, alleged to have been deposited with defendant by the plaintiff. The complaint contains three paragraphs: 1. The allegation that defendant is a corporation, duly organized under the laws of the state for the purpose of carrying on a general banking business in the city of Columbia; 2. That on the 21st of October, 1890, the plaintiff deposited with defendant the above-mentioned sum of money, which said sum defendant promised to pay to the plaintiff's order one year after said date, with interest thereon at the rate of six per centum per annum, payable semi-annually from said date; 3. That the said sum of money, with interest as aforesaid, is now due by plaintiff to defendant, and although plaintiff has made demand for the payment thereof, defendant refuses to pay the same. The defendant answered, admitting the allegations contained in the first paragraph, but denying each and every other allegation contained in the complaint.

For a better understanding of the questions presented by this appeal it will be well to state certain facts, as to which there seems to be no dispute. Some time in March, 1889, the defendant corporation was chartered, under the act entitled, "An act to provide for and regulate the incorporation of banks in this state" (19 Stat., 212), and one C. J. Iredell was made its first president, and was such at the time of the transaction **289** which forms the basis of this action. For several years previous to the incorporation of this bank the said C. J. Iredell, in copartnership with one Levi Metz, had been conducting a private bank, under very much the same name as the defendant corporation, which was under the management of said Iredell, and he was in the habit of signing his name in the conduct of that business, "C. J. Iredell, manager." For the sake of convenience, this private bank will hereinafter be designated as the "partnership bank," while the defendant corporation will be designated as the "chartered bank." There was testimony tending to show that, prior to the organization of the chartered bank, the plaintiff had deposited money, on more than one occasion, with the partnership bank, receiving certificates of deposit signed "C. J. Iredell, manager"; and there was also testimony tending to show that after the chartered bank was organized the partnership bank discontinued business, and Iredell opened

an account on the books of the chartered bank in the name of "C. J. Iredell, manager," upon which were credited collections made for the partnership bank, and against which checks were drawn to pay claims against the partnership bank. Iredell also testified that he proposed to organize "a depositors' co-operative association," which he intended to carry on under the name of "C. J. Iredell, manager," but this scheme seems to have fallen through.

At the trial, and while the plaintiff was on the stand as a witness, a paper was introduced, of which the following is a copy:

"COLUMBIA, S. C., October 21, '90.

"I hereby certify that James D. Bickley deposited with C. J. Iredell, manager, eight hundred dollars, payable to his order upon the return of this certificate properly indorsed. It is agreed that said sum of money shall remain on deposit for one year from date thereof; that interest on this amount shall be at the rate of six per cent per annum, payable semi-annually.

[SIGNED] "C. J. IREDELL, Manager."

Which was delivered to the plaintiff by Iredell when he got plaintiff's money. Against the objection of defendant, plaintiff was permitted to testify to the conversation which passed between Iredell and himself at the time the paper was²⁹⁰ delivered to him, to the effect that Iredell assured him that his money would be deposited with the chartered bank, and that this paper was intended to evidence that fact. Appellant insists that this parol testimony was inadmissible, and the first four exceptions raise the question as to the admissibility of this testimony.

As is said by Mr. Justice Story, in *Shankland v. Corporation of Washington*, 5 Pet. 394: "It is certainly very difficult to maintain that in a court of law any parol evidence is admissible substantially to change the purpose and effect of a written instrument, and to impose upon it a sense which its terms not only do not imply, but expressly repel." It is quite clear that the terms of this paper not only do not imply, but expressly repel, the idea that the chartered bank was in any way bound thereby, or in any way referred to therein. On the contrary, the paper in express terms refers to, and purports to bind, a totally different person, for in law Iredell, as manager of the partnership bank, or as manager of the depositors' co-operative association, and as president of the chartered bank, are entirely distinct and different persons.

So that even if it should be conceded that Iredell, as president of the chartered bank, had the power to bind the bank by such a paper as this (a concession which I am not now prepared to make), there is nothing whatever, either in the body of the paper or in its signature, to which alone we can look, which shows that he attempted or intended to exercise such a power. The rule is thus stated in 1 Greenleaf on Evidence, section 275: "When parties have deliberately put their engagements into writing in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; and all oral testimony of a previous *colloquium* between the parties, or of conversation or declarations at the time when it was completed, or afterwards, as it would tend, in many instances, to substitute a new and different contract for the one which was really agreed upon, to the prejudice ²⁹¹ possibly of one of the parties, is rejected": To same effect see *Falconer v. Garrison*, 1 McCord, 209.

It is very possible that if the parol testimony in question had been offered to show of what, or for whom, C. J. Iredell was manager, it would have been competent (inasmuch as the terms of the paper itself did not disclose that fact) under the cases of *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326; *Baldwin v. Bank of Newbury*, 1 Wall. 234; *Robertson v. Pope*, 1 Rich. 501; 44 Am. Dec. 267; *Dupont v. Mt. Pleasant Ferry Co.*, 9 Rich. 255. But here the evidence was offered for no such purpose. On the contrary, it was offered for the purpose of showing that the contract upon which the plaintiff sued was made with an entirely different person from the one named in the paper delivered to the plaintiff as evidence of said contract, the paper showing that the contract was made with C. J. Iredell, manager, while the parol testimony objected to was intended to show that it was made with the chartered bank through its president, and that, too, without the slightest evidence tending to show that the president had any authority whatever to make such a contract, or had ever, in any instance, signed his name as manager of the chartered bank, or had in any way ever been designated as such. The cases cited to show that a receipt may be explained by parol evidence have no application, as the paper in question, an ordinary certificate of deposit, has none of the elements of a

receipt, but, on the contrary, is more like an ordinary promissory note, for it is certainly an obligation to pay a specified sum of money at a time stated, with interest at a specified rate. In *Miller v. Austen*, 13 How. 218, a paper practically identical in form with this, was held to be a note, upon which the indorser was held liable, as in case of an ordinary note.

The respondent, however, relies strongly upon the case of *Steckel v. First Nat. Bank*, 93 Pa. St. 376, reported also in 39 Am. Rep. 758, where several cases are collated in a note. That case is not in point here for several reasons. The opening sentence of the opinion is in these words: "The principal cause of complaint in this case is, that the learned judge of the court below withdrew from the jury ²⁹² the consideration of the question of fraud, upon the ground that there was not sufficient evidence to submit it"; and in a subsequent part of the opinion the following language is found: "The plaintiffs, after ascertaining the fraudulent character of the transaction, tendered the certificate to the bank, and demanded the payment of the original deposit. In other words, they rescinded the contract on the ground of fraud. If their allegations are true, they had a right to do so, and proceed upon the original cause of action." From this it would seem that the action was based upon the ground of fraud, and as fraud and mistake constitute exceptions to the general rule as to the admissibility of parol evidence to explain or vary a written contract, it is somewhat difficult to understand the application of that case to the one now under consideration, where neither fraud nor mistake is alleged.

Again, in that case the deposit was made over the counter of the bank with the teller of the bank, in the presence of the cashier, officers specially charged with the safekeeping and handling the funds of the bank, while here the deposit is claimed to have been made with the president of the bank, an officer who does not ordinarily handle the funds of the bank, gives no bond, and who was not shown to have had any authority, either express or implied, to receive deposits, unless such authority is incident to his office as president, a matter which will be presently considered. Again, in that case it was shown that the plaintiffs kept a regular account with the bank, and were in the habit of making deposits and checking against the same in the usual manner, while here the transaction now in question seems to have been the first which the plaintiff claims to have had with the chartered bank, though

there is evidence that the plaintiff had had similar transactions with the partnership bank through the said C. J. Iredell. The same remarks apply, in the main, to the cases mentioned in the note in 39 Am. Rep. 761, the strongest of which is *Zeigler v. First Nat. Bank*, 93 Pa. St. 393, in favor of plaintiff's view, where it also appeared that the plaintiff, Zeigler, could not read, and was therefore liable to be more easily imposed upon. But the case of the *First Nat. Bank v. Williams*, 100 Pa. St. 123, 45 Am. Rep. 365, cited in the same note above referred to, seems to be more like the case in hand; and there it was held that the bank was not liable for a deposit made with its president under the circumstances there stated.

It is urged, however, that the action here is not upon the written certificate of deposit, a copy of which has been set out above, and, therefore, the principles above stated do not apply. As has been heretofore said in *Park v. Brooks*, 38 S. C. 300, it is never technically accurate, though quite common, to speak of an action on a note, or other instrument in writing, whereby one person promises to pay money to another, for, "properly speaking, a note is never the cause of action, but it is the breach of the promise evidenced by the note which constitutes the cause of action, and the action is upon such breach, and not upon the note." So here, while it is quite true that the plaintiff does not set out the certificate of deposit in his complaint, but simply alleges the making of the deposit of a certain sum of money, together with a promise to pay the same at the time stated, and a failure on the part of the defendant to comply with such promise, yet so soon as it appeared that the contract had been reduced to writing, no other evidence than such writing could be resorted to for the purpose of showing what were the terms of the contract, in the absence of any allegation of fraud or mistake. So that the circumstances that the action does not purport to be upon the certificate of deposit cannot affect the question. It seems to me, therefore, that in any view which may be taken of the matter, the parol evidence objected to was inadmissible; and this being so, the motion for a nonsuit should have been granted, as there does not seem to be any other evidence tending to show a contract between the plaintiff and the defendant bank.

While this would be sufficient to dispose of the appeal, yet it may not be amiss to consider very briefly the other grounds

of appeal. The fifth ground of appeal cannot be sustained. If the paper in question was in court at the time, no previous notice to produce it was necessary: *Reynolds v. Quattlebum*, 2 Rich. 140. Moreover, the object was to contradict ²⁹⁴ the testimony of C. J. Iredell, by showing that the defendant had paid the witness interest on deposits at the rate of six per centum, and this the witness might have proved without reference to the paper, as it was collateral to the issue on trial. The sixth ground has been disposed of by what has already been said.

As to the seventh exception, in view of the fact that the real defense was that plaintiff's money was deposited by Iredell in the defendant bank, not to the credit of the plaintiff, but to the credit of Iredell, manager, it seems to me that the charge on this point should have been qualified as demanded by defendant's first request to charge.

The eighth ground complains of error in instructing the jury as to the effect of the view which might be taken by them of the testimony hereinbefore held to be incompetent, and under that holding the eighth ground must be sustained.

The ninth ground cannot be sustained, for the charge shows that the instructions therein referred to were sufficiently guarded.

The tenth ground is based upon a misconception of the charge. The circuit judge did not refuse to charge "that the ordinary duties of the president of a bank do not authorize him to receive deposits," and in the form in which this exception is stated it cannot be sustained.

The eleventh exception cannot be sustained, as the request upon which it was based trenched upon the province of the jury, and, moreover, confined the issue between too narrow limits.

The twelfth exception is sustained. It is the province of the judge to construe written instruments, and certainly there was nothing on the face of the certificate of deposit to indicate that the defendant bank had any connection with it.

The thirteenth exception is open to the objection, that to charge as there requested would require the judge to invade the province of the jury, by instructing them as to the force and effect of the testimony.

²⁹⁵ The fourteenth exception must be sustained. If, as the circuit judge intimated, correctly, as I think, that to receive deposits is not one of the duties incident to the office

of a president of a bank, then to make a bank responsible for a deposit so received the burden of proof in a given case is upon the plaintiff to take his case out of the general rule, either by showing that the president in such case had express authority to do so, or that such authority should be inferred from all the circumstances surrounding the transaction, or that the money of the depositor was actually received by the bank as his money, in either of which cases the bank would be liable. But to make it liable, it is incumbent on the plaintiff to show that the exceptional circumstances exist. It is earnestly insisted by counsel for plaintiff that it is a duty incident to the office of president to receive deposits, and therefore, that as the deposit sued for in this case was received by the person who was, at the time, president of the defendant bank, the bank is liable even if nothing else is shown. I am not prepared to accept this doctrine. On the contrary, it seems to me that the weight of authority, as shown by the cases cited by appellant's counsel, as well as of reason, is opposed to such a view. The authorities cited by the counsel for plaintiff to sustain his view rest alone upon the case of *Hazleton v. Union Bank*, 32 Wis. 34, in which the point here under consideration was not really decided, though there is a remark in that case which does sustain plaintiff's view. But that case is not authoritative here, and, so far as the point under discussion here is concerned, does not seem to rest upon sound principles. In addition to this, the question as to the general authority of a president to receive deposits does not properly arise in this case, as the circuit judge did not distinctly pass upon this question, and what he did say seemed rather to deny such general authority on the part of the president of a bank.

The fifteenth ground, as has been frequently said, raises no question which this court can properly consider.

296 It seems to me, therefore, that the judgment of the circuit court should be reversed, and the case remanded to that court for a new trial; and this view having been concurred in by the other members of the court, it is so adjudged.

CERTIFICATES OF DEPOSIT.—BANK WHEN BOUND BY THOUGH IN THE NAME OF AN OFFICER: See the extended note to *O'Neill v. Bradford*, 42 Am. Dec. 576. A depositor in a national bank requested a certificate of deposit drawing interest for a portion of his deposit. The teller gave him a certificate purporting to be issued by B. & Co., a private banking firm, and informed him in the presence of the cashier of the bank that this was the

bank's certificate. The members of the firm were the managing officers of the bank, but had a separate place of business in the same town. The bank was held liable to the plaintiff for the amount of his deposit: *Steckel v. First Nat. Bank*, 93 Pa. St. 376; 39 Am. Rep. 758, and extended note, especially at page 761, where the leading question involved in the principal case is discussed: See *First Nat. Bank v. Williams*, 100 Pa. St. 123; 45 Am. Rep. 365.

FERGUSON v. HARRIS.

[89 SOUTH CAROLINA, 323.]

MARRIED WOMAN'S CONTRACT.—A note given by a married woman in payment for material used in the construction of a building on her separate estate, cannot be avoided by her under the plea of her disability as a married woman to make such contract. And it makes no difference that she signed the note under a threat from the payee that he would file a mechanic's lien.

MARRIED WOMAN'S CONTRACTS—RATIFICATION OF UNAUTHORIZED ACT.—A married woman by adopting the unauthorized act of a third person in obtaining, and having charged to her account, materials used for the benefit of her separate estate, is bound by her subsequent express promise to pay therefor.

CONTRACTS—CONSIDERATION.—**MORAL OBLIGATION** to pay money or perform a duty is a good consideration for a subsequent express promise to do so, even if there was originally no legal obligation to perform.

Benet, McCullough and Parker, for the appellant.

Cothran, Wells, Ansel and Cothran, for the appellee.

329 McIVER, C. J. This is an action brought by the plaintiff, as administratrix of L. B. Cline, deceased, to recover a certain sum of money for which the defendant had executed her note to said Cline. The execution of the note was admitted by the defendant, but she set up three defenses: 1. That she was a married woman at the time that the contract was executed, and she had no power to make such a contract; 2. That there was no consideration for the contract evidenced by the note; 3. That the note was signed under duress. The third defense was very properly abandoned at the trial, as there was no evidence to sustain it. As to the first defense, inasmuch as the undisputed facts show that the note was given for a bill of lumber furnished by Cline, and **330** actually used in the construction of a house on defendant's land, which was her separate estate, it is difficult to see how such a defense could be sustained.

So that, as it appears to us, the only real controversy in the case arises out of the second defense, was there any consider-

ation for the note? For a proper understanding of this question, a brief statement of the facts is necessary. It appears that the defendant, being desirous of having a house built upon her separate estate, entered into some arrangement with the firm of Gilreath and Harris (the latter being the husband of defendant), who were engaged in the business of furnishing building materials, the nature of which was not very clearly disclosed by the testimony. The undisputed facts are, however, that the lumber for which the note was given was furnished by Cline and used in the construction of defendant's house, and the bill for the same was charged to the defendant on the books of Cline. After the lumber was furnished and so used, Cline demanded payment from defendant, who declined to pay unless Cline would deduct the amount of an account which Gilreath and Harris held against Cline, which deduction Cline declined to make, alleging that such account should be set off against a claim which he held against another firm of which Gilreath was a member. Whereupon, under a threat from Cline that he would file a mechanic's lien, the defendant signed the note in controversy.

Under the charge of the circuit judge, the jury found a verdict for the plaintiff, and defendant appeals upon the several grounds set out in the record. Without considering these grounds *seriatim*, we propose to consider what we understand to be the several questions made thereby. Inasmuch as there was no evidence that the lumber was ever charged to Gilreath and Harris on the books of Cline, but, on the contrary, it was charged to the defendant, and no evidence that Gilreath and Harris were ever held by Cline to be liable to him, the question whether the defendant, being a married woman, could assume the payment of a debt due by a third person (Gilreath and Harris), even though the debt was contracted for ³³¹ articles used in the construction of a house erected on defendant's separate property and for her use, cannot properly arise in this case, and need not, therefore, be considered.

Granting, for the sake of the argument, that Gilreath and Harris, without previous authority from defendant, had ordered the lumber from Cline, we see no reason why the defendant could not, after receiving the benefit of the lumber, adopt the previously unauthorized act of Gilreath and Harris, and assume the payment for the materials used for the benefit of her separate estate; and especially would this be so in

a case like this, where the undisputed testimony shows that the lumber was charged to her and not to Gilreath and Harris, thereby demonstrating that the credit was extended to her and not to Gilreath and Harris. It is very true, that if Gilreath and Harris, without authority, ordered the lumber, the defendant would have been under no obligation, either legal or moral, to accept the lumber, but might with perfect propriety have repudiated the unauthorized act of Gilreath and Harris. But when she accepted the lumber and allowed it to be used in the construction of the building which she desired constructed on her separate estate, she thereby assumed at least a moral obligation to pay for the same, and when by her subsequent express promise, as evidenced by the note in question, she agreed to pay the amount of the lumber bill, she unquestionably became legally liable therefor.

It is earnestly urged, however, that a mere moral obligation is not sufficient to constitute a valid consideration for an agreement to pay money, unless such moral obligation rests upon a previous legal obligation, the power to enforce which has been lost by reason of some positive rule of law. It must be admitted that the weight of modern authority elsewhere does seem to support the rule invoked: 1 Parsons on Contracts, 434; 3 Am. & Eng. Ency. of Law, 840. But the distinguished author first cited, who states the modern rule as follows: "A moral obligation to pay money or to perform a duty is a good consideration for a promise to do so, where there was originally an obligation to pay the money or to do the duty, which was enforceable at law but for the interference of some rule of law." ³³² Thus, a promise to pay a debt contracted during infancy, or barred by the statute of limitations or bankruptcy, is good, without other consideration," is bound to admit that the modern rule is not "very creditable to the common law." Both of these authors admit that the rule was originally otherwise. The new departure, as it may be called, seems to rest upon a learned note to the case of *Wen-nall v. Adney*, 3 Bos. & P. 249. It seems to me, however, that a more correct view of the law is presented in a note to the case of *Comstock v. Smith*, 7 Johns. 89.

All of the authorities admit that where an action to recover a debt is barred by the statute of limitations, or by a discharge in bankruptcy, a subsequent promise to pay the same can be supported by the moral obligation to pay the same, although the legal obligation is gone forever; and I am unable

to perceive any just distinction between such a case and one in which there never was a legal, but only a moral, obligation to pay. In the one case, the legal obligation is gone as effectually as if it had never existed, and I am at a loss to perceive any sound distinction in principle between the two cases. In both cases, at the time the promise sought to be enforced is made, there is nothing whatever to support it except the moral obligation, and why the fact that, because in the one case there was once a legal obligation, which, having utterly disappeared, is as if it had never existed, should affect the question, I am at a loss to conceive. If, in the one case, the moral obligation, which alone remains, is sufficient to afford a valid consideration for the promise, I cannot see why the same obligation should not have the same effect in the other. The remark made by Lord Denman, in *Eastwood v. Kenyon*, 11 Ad. & E. 438, that the doctrine for which I am contending "would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it," is more specious than sound, for it entirely ignores the distinction between a promise to pay money which the promisor is under a moral obligation to pay, and a promise to pay money which the promisor is under no obligation, either legal or moral, to pay. It seems to me that the cases relied upon to ³³³ establish the modern doctrine, so far as my examination of them has gone, ignore the distinction pointed out in the note to *Comstock v. Smith*, 7 Johns. 89, above cited, between an express and an implied promise resting merely on a moral obligation, for while such obligation does not seem to be sufficient to support an implied promise, yet it is sufficient to support an express promise.

But whatever may be the rule elsewhere, it seems to me that in this state the rule is, that "a moral obligation is a sufficient consideration to support an express *assumpsit* made after the obligation incurred. It is equivalent to a previous request; but it must be such an obligation as is denominated by moralists 'perfect'—an obligation of justice, and not of benevolence or piety merely": *McMorris v. Herndon*, 2 Bail. 56; 21 Am. Dec. 515. In that case, Harper, J., in delivering the opinion of the court, quotes with approval the following language used by Lord Mansfield in *Hawkes v. Saunders*, 1 Cowp. 290: "Where a man is under a moral obligation which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration." The case

of *McMorris v. Herndon*, 2 Bail. 56, 21 Am. Dec. 515, has been expressly recognized in *Lewis v. Lewis*, 3 Strob. 532, and the same doctrine is announced in *Glasgow v. Martin*, 1 Strob. 89. These cases show clearly that the moral obligation resting upon the defendant to pay for the lumber used in the construction of her house constituted a sufficient consideration for her express promise to pay for the same, as evidenced by the note in question.

Under this view, it seems to us unnecessary to inquire more particularly into the other grounds of appeal.

The judgment of this court is that the judgment of the circuit court be affirmed

Moral Obligation as Consideration to Uphold an Express Promise.

1. *Moral Obligation as Consideration, Viewed Generally.*—The doctrine of the principal case, that a moral obligation is a sufficient consideration to support an express *assumpsit*, though sustained by the earlier South Carolina decisions cited in the opinion, does not find strong support in the later decisions of the courts generally. In the early English case of *Hauckes v. Saunders*, 1 Cowp. 289, 294, Buller, J., stated the rule to be, that "wherever a defendant is under a moral obligation, or is liable in conscience and equity to pay, that is a sufficient consideration." And in the later case of *Lee v. Muggeridge*, 5 Taunt. 36, 46, it was said by Lord Mansfield "to have been long established that where a person is bound morally and conscientiously to pay a debt, though not legally bound, a subsequent promise to pay will give a right of action": See, also, *Cooper v. Martin*, 4 East, 76; *Pillans v. Mierop*, 3 Burr. 1664. But the rule thus broadly stated by Lord Mansfield has been limited in the later English cases, the courts having adopted the doctrine laid down in the note (a) to *Wennall v. Adney*, 3 Bos. & P. 249, "that an express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original cause of action if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision": *Eastwood v. Kenyon*, 11 Ad. & E. 438; *Beaumont v. Reeve*, 8 Ad. & E., N. S., 483; *Littlefield v. Shee*, 2 Barn. & Adol. 811; *Jennings v. Brown*, 9 Mees. & W. 501. It was accordingly held that a pecuniary benefit, voluntarily conferred by the plaintiff and accepted by the defendant, is not such a consideration as will support an action of *assumpsit* on a subsequent express promise by the defendant to reimburse the plaintiff: *Eastwood v. Kenyon*, 11 Ad. & E. 438.

In this country, the prevailing doctrine is in accord with the doctrine announced in the later English cases, and it is very generally held that, strictly speaking, a moral, distinguished from a legal, obligation, and where there never was any thing more than a moral obligation, is never a sufficient consideration to uphold an express promise. To support an express promise there must be some thing more than such consideration as arises out of the moral duties or affections alone: *Ellicott v. Peterson*, 4 Md. 476, 492; *Ingersoll v. Martin*, 58 Md. 67; 42 Am. Rep. 322; *Hamor v. Moore*, 8 Ohio St. 239; *Smith v. Ware*, 13 Johns. 257; *Allen v. Bryson*, 67 Iowa, 591, 596; 56 Am.

Rep. 358; *Edwards v. Davis*, 16 Johns. 281, 283; *Smith v. Tripp*, 14 R. I. 112; *Smith v. Allen*, 1 Lans. 101; *Parker v. Carter*, 4 Munf. 273; 6 Am. Dec. 513; *Holley v. Adams*, 16 Vt. 206; 42 Am. Dec. 508; *Schnell v. Nell*, 17 Ind. 29; 79 Am. Dec. 453. Thus, where one person renders services for another gratuitously, and with no expectation of being paid therefor, no obligation is incurred by the recipient which will support a subsequent promise to pay for the services: *Allen v. Bryson*, 67 Iowa, 591; 56 Am. Rep. 358. In this case the court say: "We do not believe a case can be found where a moral obligation alone has been held to be a sufficient consideration for a subsequent promise"; and see *McCarty v. Building Assn.*, 61 Iowa, 287; *Wills v. Ross*, 77 Ind. 1; 40 Am. Rep. 279. Such considerations as love, friendship, natural affection, even the close relation existing between parent and child, are not of themselves sufficient to support an express promise: *Shepard v. Rhodes*, 7 R. I. 470; 84 Am. Dec. 573; *Holley v. Adams*, 16 Vt. 206; 42 Am. Dec. 508. As where a son of full age, and not living with his father, was taken sick among strangers, and being poor and in distress, was relieved by the plaintiff, and the father afterwards wrote to the plaintiff promising to pay him the expenses incurred, it was held that such promise would not sustain an action: *Mills v. Wyman*, 3 Pick. 207; and see *Dodge v. Adams*, 19 Pick. 429. There are, however, some decisions in accord with the principal case in holding that a moral obligation is a sufficient consideration for an express promise: See *Barlow v. Smith*, 4 Vt. 144; *Wilson v. Burr*, 25 Wend. 386; *Glass v. Beach*, 5 Vt. 172; *Commissioners etc. v. Perry*, 5 Ohio, 58; *Cardwell v. Strother*, Litt. Sel. Cas. 429; 12 Am. Dec. 326; *State v. Reigart*, 1 Gill, 1; 39 Am. Dec. 628; but by the weight of authority in this country, as in England, this rule is limited in its application to cases where at some time or other a good or valuable consideration has existed. Its operation is confined to those cases where there was a precedent good consideration to support an express promise, or from which the law would imply a promise which might have been, or could yet be, enforced, but for the operation of some positive rule of law, as, for instance, a debt once valid and subsisting, but discharged in bankruptcy or barred by limitation, or the contract of an infant which he may confirm at majority: *Viser v. Bertrand*, 14 Ark. 267; *Mills v. Wyman*, 3 Pick. 207; *Hatchell v. Odom*, 2 Dev. & B. 302; *Turlington v. Slaughter*, 54 Ala. 195; *Edwards v. Nelson*, 51 Mich. 121; *Pittman v. Elder*, 76 Ga. 371; *Nine v. Starr*, 8 Or. 49; *Wiggins v. Keizer*, 6 Ind. 252, 257; *Yates v. Hollingsworth*, 5 Harr. & J. 216. But stated as a general principle, if there be a pre-existing obligation to pay, either legal or equitable, which cannot be enforced, and the party promises, notwithstanding he may be exempt from all liability by operation of law, the former liability, in connection with the honesty and rectitude of the thing, form sufficient consideration to support the promise: *Ellicott v. Peterson*, 4 Md. 476; *Wills v. Ross*, 77 Ind. 1; 40 Am. Rep. 279; *Warren v. Whitney*, 24 Me. 561; 41 Am. Dec. 406; *Ingersoll v. Martin*, 58 Md. 67; 42 Am. Rep. 322; *Stebbins v. County of Crawford*, 92 Pa. St. 289; 37 Am. Rep. 687. A man may always bind himself by a promise to pay an honest debt whatever bar may, in fact or law, exist to preclude an action on the original contract under which the indebtedness was incurred: *Morse v. Crats*, 43 Ill. App. 513. Illustrations of this principle and its application will be found in the succeeding paragraphs.

2. *Consideration of Promise to Pay After Debt Released.*—It has been held that if a debtor has been voluntarily released by his creditor, a moral obligation still exists, sufficient to support a subsequent promise to pay the debt:

Willing v. Peters, 12 Serg. & R. 177, 182; questioned in *Snevily v. Read*, 9 Watts, 396, 401.

The rule sustained by the weight of authority, however, is, that if a debt is voluntarily released by the creditor, a subsequent promise to pay it made by the debtor is without consideration: *Warren v. Whitney*, 24 Me. 561; 41 Am. Dec. 406; *Hale v. Rice*, 124 Mass. 292; *Mason v. Campbell*, 27 Minn. 54. The courts clearly distinguish the case of an exemption or discharge from all pre-existing liability by operation of some positive provision of law, from the case of a release or discharge from liability by the voluntary act of the creditor himself. In the former case, the pre-existing obligation, though fully and completely discharged by operation of law, is, nevertheless, a sufficient foundation for a new promise to pay; while in the latter case, that is, a discharge by act of the creditor, the pre-existing liability that has been so released does not form a sufficient consideration for a new promise to pay: *Montgomery v. Lampton*, 3 Met. (Ky.) 519; *Shepard v. Rhodes*, 7 R. I. 470; 84 Am. Dec. 573; *Ingersoll v. Martin*, 58 Md. 67; 42 Am. Rep. 322. This distinction is recognized in *Stafford v. Bacon*, 1 Hill, 532, 37 Am. Dec. 366, in which a debt had been discharged by accord and satisfaction for less than the amount due, and it was held that there remained no such moral obligation to pay the balance as would support a subsequent promise, though it would have been otherwise if the discharge had been by mere operation of law: And see *Cook v. Bradley*, 7 Conn. 57; 18 Am. Dec. 79; *In re Merriman's Estate*, 44 Conn. 587. The reason given for the distinction, as applied to the two cases, is, that in the former the debt having been extinguished by the full, free assent of the creditor, all obligation, legal and moral, is discharged; while an extinction or barring of the debt by act or operation of law, without regard to the will of the creditor, operates only on the legal obligation, leaving the moral obligation unimpaired: *Higgins v. Dale*, 28 Minn. 126.

Although a person is released from a debt by his discharge in bankruptcy, yet he may restore it by a new promise to pay the specific debt. The moral obligation to pay, coupled with the fact of the prior legal obligation, is a sufficient consideration for such new express promise: *Bolton v. King*, 105 Pa. St. 78; *Wills v. Ross*, 77 Ind. 1; 40 Am. Rep. 279; *Shockey v. Mills*, 71 Ind. 288; 36 Am. Rep. 196; *Edwards v. Nelson*, 51 Mich. 121; *Post v. Losey*, 111 Ind. 75, 88; 60 Am. Rep. 677; *Wislizenus v. O'Fallon*, 91 Mo. 184. But the promise, by which a debt discharged by bankruptcy proceedings is revived, must be express, clear, distinct, and unequivocal, in contradistinction to a promise implied from an acknowledgment of the justness or existence of the debt: *Meech v. Lamon*, 103 Ind. 515, 53 Am. Rep. 540. The mere recognition or acknowledgment by a bankrupt of a debt which has been discharged by bankruptcy does not create a legal obligation on him to pay the debt: *Merriman v. Bailey*, 1 Cush. 77; 48 Am. Dec. 591; *Porter v. Porter*, 31 Me. 169. Nor can a promise to pay be implied or inferred, and partial payments will not revive the debt in this respect: *Lawrence v. Harrington*, 122 N. Y. 408; *White v. Cushing*, 30 Me. 267; nor will the payment of interest revive the liability to pay the principal: *Institution for Savings v. Littlefield*, 6 Cush. 210. It may, however, be an absolute or a conditional promise, but in either case it must be unequivocal, and the occurrence of the condition must be averred if the promise be conditional: *Allen v. Ferguson*, 18 Wall. 1; *St. John v. Stephenson*, 90 Ill. 82; *Way v. Sperry*, 6 Cush. 238; 52 Am. Dec. 779. A promise by the discharged bankrupt to pay as soon as he is able revives the debt, and the creditor may enforce payment upon the happening of the condition mentioned: *Carey v. Hess*, 112 Ind. 398; *In re Ekins*, 6 Fed. Rep.

170. Compare *Katz v. Moessinger*, 110 Ill. 372; *Bolton v. King*, 105 Pa. St. 78; *Holough v. Murphy*, 114 Pa. St. 358. If an acknowledgment is relied upon, it must be so far unqualified as to necessarily authorize the implication of the promise to pay, and no other: *Craig v. Seitz*, 63 Mich. 727. Nothing amounts to a new promise to avoid a discharge in bankruptcy that is not intended distinctly as a recognition and renewal of the debt as binding: *Craig v. Seitz*, 63 Mich. 727; *Brewer v. Boynton*, 71 Mich. 254; *Elwell v. Cumner*, 136 Mass. 102, 104; *Brown v. Collier*, 8 Humph. 510. And where a debtor, after his discharge in bankruptcy, wrote to his creditor, "I mean right, I will pay something on account," and later, "I shall pay you something as soon as possible," it was held that the letters did not take the debt out of the operation of the discharge in bankruptcy: *Bigelow v. Norris*, 139 Mass. 12. And to the same effect see *Bigelow v. Norris*, 141 Mass. 14; *Lawrence v. Harrington*, 122 N. Y. 408, 414; *Allen v. Ferguson*, 18 Wall. 1, 4. But the words, "I have always said, and still say, that she shall have her pay," spoken by the maker of a note, who has been discharged therefrom in bankruptcy, may be properly construed by the jury as a distinct and unequivocal promise to pay the note: *Pratt v. Russell*, 7 Cush. 462. So, a promise in these words: "I will pay the note," is held a sufficient new promise to revive a debt discharged by bankruptcy: *Hunt v. Jones*, 1 Ind. App. 545. But a promise embodied in the words, "I do not intend you shall lose it, I will make it all right," is held an insufficient new promise to revive such a debt: *Meech v. Lamon*, 103 Ind. 515; 53 Am. Rep. 540. To have that effect there must be an expression by the discharged debtor of a clear intention to bind himself to pay the debt, and the expression of an intention to pay is not sufficient: *Meech v. Lamon*, 103 Ind. 515; 53 Am. Rep. 540; *Shockey v. Mills*, 71 Ind. 288; 36 Am. Rep. 196.

The new promise need not be made to the holder of the debt, though it must refer to the debt: *Bennett v. Everett*, 3 R. I. 152; 67 Am. Dec. 498. It may be made to an agent of the creditor: *Pratt v. Russell*, 7 Cush. 462. And it has been held that the promise may be binding, though not made to the creditor or his agent, but the fact that the words were spoken to a third person may be considered, in connection with the other facts, in determining whether they amount in law to an express promise: *Evans v. Carey*, 29 Ala. 99.

It has been held that a new promise by a bankrupt to pay, made before his final discharge in bankruptcy, is without consideration and void, and will not revive the original debt: *Ingersoll v. Rhodes*, Hill & D. 371; *Graves v. McGuire*, 79 Ky. 532; *Thornberry v. Dils*, 80 Ky. 241. But the doctrine sustained by the weight of authority is, that a promise made after the debtor has been adjudicated a bankrupt, but before he has obtained his certificate of discharge, is binding: *Knapp v. Hoyt*, 57 Iowa, 591; 42 Am. Rep. 59; *Lanagin v. Nowland*, 44 Ark. 84; *Fraley v. Kelly*, 67 N. C. 78; *Cook v. Shearman*, 103 Mass. 21; *Otis v. Gazlin*, 31 Me. 567; *Katz v. Moessinger*, 7 Ill. App. 536; *In re Ekins*, 6 Fed. Rep. 170; *Kirkpatrick v. Tattersall*, 13 Mees. & W. 770. As the discharge relates back and bars only debts existing at the time of the filing of the petition for adjudication, there is held to be no distinction between a promise reviving a debt made before, and one made after, the granting of the certificate of discharge, if made after the bankruptcy proceedings were commenced: *Wiggin v. Hodgdon*, 63 N. H. 39. But compare *Nelson v. Stewart*, 54 Ala. 115; 25 Am. Rep. 660; *Stebbins v. Sherman*, 1 Sand. 510.

A new promise, in case of a discharge in bankruptcy, need not be in writing: *Way v. Sperry*, 6 Cush. 238; 52 Am. Dec. 779; *Lanagin v. Norland*, 44 Ark. 84; *Ross v. Jordan*, 62 Ga. 298; *Feeny v. Daly*, 8 Cal. 84. It may be by parol, although the original promise was in writing: *Farmers and Mechanics v. Flint*, 17 Vt. 508; 44 Am. Dec. 351. The negotiability of a note is revived by a new promise after a discharge in bankruptcy, and the new promise inures to the benefit of a subsequent indorsee: *Way v. Sperry*, 6 Cush. 238; 52 Am. Dec. 779. And see *Marshall v. Tracy*, 74 Ill. 380.

3. *Consideration of Promise to Pay Debt Barred by Limitation.*—In accordance with the doctrine that a moral consideration growing out of a past legal or equitable obligation, barred of enforcement, will support a subsequent express promise, it is well settled that a new promise to pay a debt barred by the statute of limitations is not without consideration: See *Cook v. Bradley*, 7 Conn. 57; 18 Am. Dec. 79, 84; *Turlington v. Slaughter*, 54 Ala. 195; *Ingersoll v. Martin*, 58 Md. 67; 42 Am. Rep. 322; and also the opinion in the principal case. Although the statute not only bars the right of action, but extinguishes the debt, yet where a valid and binding debt has become barred under that statute, it can be revived by a new promise, made after the lapse of the period of limitation, without an additional consideration for the promise: *Pittman v. Elder*, 76 Ga. 371.

Statutes of Limitation are now very generally regarded as statutes of repose, and not merely statutes of presumption of payment. It is said that such statutes act upon the remedy merely, and not upon the debt: See *Waltermire v. Westover*, 14 N. Y. 20; *Wilcox v. Williams*, 5 Nev. 206; *Commonwealth v. McGowan*, 4 Bibb, 62; 7 Am. Dec. 737; *Bizzell v. Nix*, 60 Ala. 281; 31 Am. Rep. 38. *Contra: McCracken Co. v. Trust Co.*, 84 Ky. 350. The statute does not have the effect to extinguish a debt, but only bars the remedy, and thus becomes a statute of repose: *McCormick v. Brown*, 36 Cal. 180; 95 Am. Dec. 170; *Grant v. Burr*, 54 Cal. 298; *Shaw v. Silloway*, 145 Mass. 503; *Jordan v. Jordan*, 85 Tenn. 561; *McCarthy v. White*, 21 Cal. 495; 82 Am. Dec. 754. But the right of action being merely suspended by favor of the law, there is still a moral obligation and duty remaining upon the debtor to pay, which constitutes a sufficient consideration for the new promise: *Farmers and Mechanics v. Flint*, 17 Vt. 508; 44 Am. Dec. 351; *Marshall v. Holmes*, 68 Wis. 555. And the operation of the statute upon the remedy being removed by the new promise, the parties are held to be left *in statu quo*: *Kelly v. Leachman*, Sup. Ct. Idaho, 1893; and see *Curshore v. Huyck*, 6 Barb. 583; *Stewart v. Garrett*, 65 Md. 392; 57 Am. Rep. 333; *Sturges v. Crowninshield*, 4 Wheat. 122, 207. The statute of limitations does not destroy the original debt so effectually that it cannot be revived. It opens the courts to the debtor, and invites him to enter and protect himself from his obligations by pleading its provisions in bar of a recovery, but it does not compel him to do this; and he may waive or renounce it when he does not, by so doing, injure others or affect the public interests, or abrogate or do away with enactments made for the preservation of public order or good morals: *Pittman v. Elder*, 56 Ga. 371; and see *Peel v. Bryson*, 72 Ga. 331; *Heltman v. Kiene*, 73 Iowa, 448; 5 Am. St. Rep. 693. A new promise is an implied admission that the debt has not been paid, and amounts to a voluntary waiver of the statute: *Campbell v. Holt*, 115 U. S. 632.

As regards the sufficiency of a new promise to revive a debt barred by limitation, it must not be vague, indefinite, or uncertain. It must acknowledge a fixed sum or a balance which admits of ready and certain ascertainment: *Huff v. Richardson*, 19 Pa. St. 389; *Bell v. Crawford*, 8 Gratt. 110;

Quarrier v. Quarrier, 36 W. Va. 310; *Bell v. Morrison*, 1 Pet. 362. It ought to be such a promise as, if declared upon, would support an action of itself: *Aylett v. Robinson*, 9 Leigh, 45. But the implied promise to pay, arising from an admission that the debt is then due, or that a liability then exists, is as effectual to remove the bar of the statute of limitations and revive the debt, as an express promise: *Ross v. Ross*, 20 Ala. 105; *Biddle v. Brizzolara*, 56 Cal. 374; 64 Cal. 354; *Krebs v. Olmstead*, 137 Mass. 504; *Phelps v. Williamson*, 26 Vt. 230; *Tanner v. Smart*, 6 Barn. & C. 603. So, a different rule applies in case of a debt discharged in bankruptcy from that applied to the defense of the statute of limitations, and in the latter case payment of a part of the debt is regarded as an acknowledgment of the existence of the debt, and the law implies a promise to pay the residue: *Lawrence v. Harrington*, 122 N. Y. 408; *State Nat. Bank v. Harris*, 96 N. C. 118; *Custy v. Donlan*, 159 Mass. 245; 38 Am. St. Rep. 419; *Foster v. Smith*, 52 Conn. 449; *Miner v. Lorman*, 56 Mich. 212; *Harlock v. Ashberry*, 19 Ch. Div. 539. And it is said there can be no more unequivocal acknowledgment of a present existing debt than a payment on account of it: *Barclay's Appeal*, 64 Pa. St. 69, 72. An acknowledgment cannot, however, be regarded as an admission of indebtedness where the accompanying circumstances are such as to repel that inference or to leave it in doubt whether the party intended to prolong the time of legal limitation: *Roscoe v. Hale*, 7 Gray, 274; *Nelson v. Becker*, 32 Neb. 99; *Fort Scott v. Hickman*, 112 U. S. 150. Where the promise to pay the debt is conditional, there must be evidence that the condition has been performed: *Mitchell's Claim*, L. R. 6 Ch. 822, 828; and see *Chase-more v. Turner*, L. R. 10 Q. B. 500; *Green v. Humplreys*, 23 Ch. Div. 207. The new promise, and not the old debt, is held to be the measure of the creditor's right. And if the debtor promises to pay the old debt when he is able, or by installments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him: *Philips v. Philips*, 3 Hare, 281, 299; *Shepherd v. Thompson*, 122 U. S. 231.

It is held that an acknowledgment of a debt, to take the case out of the statute of limitations, must be made to the creditor himself, or some one acting for him. It must be made to the claimant, and not to mere strangers: *Hargis v. Sewell*, 87 Ky. 63; *Collar v. Patterson*, 137 Ill. 403; *Biddle v. Brizzolara*, 64 Cal. 354; *City of Houston v. Jaukowskie*, 76 Tex. 368; 18 Am. St. Rep. 57; *Kirby v. Mills*, 78 N. C. 124; 24 Am. Rep. 460. Where, however, the acknowledgment is to a stranger, and it appears that it was the intention that it should be communicated to and influence the creditor, it is as effectual to defeat the statute as if it had been made directly to the creditor or his authorized agent: *De Freest v. Warner*, 98 N. Y. 217; 50 Am. Dec. 657; and see *In re Kendrick*, 107 N. Y. 104; *Spangler v. Spangler*, 122 Pa. St. 358; 9 Am. St. Rep. 114; *Oroman v. Stull*, 119 Pa. St. 91; *Libby v. Robinson*, 79 Me. 168; *Fort Scott v. Hickman*, 112 U. S. 150. In Maryland, the acknowledgment, whether made to the party or his agent, or to a stranger, is sufficient: *Stewart v. Garrett*, 65 Md. 392; 57 Am. Rep. 333. To make the acknowledgment effective, it must have been made by the debtor, or for him, by his authorized agent: *McMullen v. Rafferty*, 89 N. Y. 456. In Michigan, a payment or new promise by one of several joint debtors will not keep the obligation alive as to another who had no part or privity therein: *Probate Judge v. Stevenson*, 55 Mich. 320.

4. *Past Act or Transaction Not a Sufficient Consideration.*—As a general rule, a promise must be coextensive with the consideration, and a consideration past and executed will support no other promise than such as would be

implied in law: *Roscorla v. Thomas*, 3 Ad. & E., N. S., 234. In one of the earliest English cases it was held that an *assumpsit* will not lie on a consideration that is executed: *Hunt v. Bate*, 3 Dyer, 272. And an illustration given in another early authority is, that if a man disburse money about the affairs of another without request, and then the latter promise that, in consideration of the former having laid out the money for him, he will pay him twenty pounds, that is not a good consideration, being completely executed: *West v. West*, 1 Rolle Abr. 11. This doctrine is sustained by the later authorities, and the settled rule is stated to be that a past consideration is not sufficient to support a subsequent promise, unless there was a request of the party, either express or implied, at the time of performing the consideration: *Osborne v. Rogers*, 1 Saund. 264 b, note; but where there was an express request at the time, it would in all cases be sufficient to support a subsequent promise: *Osborne v. Rogers*, 1 Saund. 264 b, note; *Bradford v. Boulston*, 8 I. R. C. L. 468; *Chadwick v. Knox*, 31 N. H. 226; 64 Am. Dec. 329; *Pool v. Horner*, 64 Md. 131. The execution by A, at B's request, of a bill of sale of a vessel, to C, was held a sufficient consideration to support a subsequent express promise by B to pay on C's default: *Bradford v. Boulston*, 8 I. R. C. L. 468. It is held, however, that a past consideration, from which the law implies a promise, is not, generally speaking, sufficient to maintain any other promise than that which the law implies: *Hopkins v. Logan*, 5 Mees. & W. 241; *Jackson v. Cobbin*, 8 Mees. & W. 790. And a matter executed and past will not constitute a valid consideration, although the promise may have been induced by the moral obligation of gratitude: *Eastwood v. Kenyon*, 11 Ad. & E. 438. But a past consideration, beneficial to the defendant, to which he afterwards assents, has been held sufficient to support an action: *Doty v. Wilson*, 14 Johns. 378; *Parsons v. Robinson*, 15 N. Y. Supp. 138; 27 Jones & S. 546.

In accordance with the doctrine above stated, it is held that a warranty of goods, made by a vendor after he has completed the sale of them, if unsupported by a new consideration, is void. The consideration already given is exhausted by the transfer of the property in the goods without a warranty: *Roscorla v. Thomas*, 3 Ad. & E., N. S., 234; *Summers v. Vaughan*, 35 Ind. 323; 9 Am. Rep. 741. And where the parties to a controversy agreed in writing to submit the matter to arbitration, and two other persons, not interested, promised in writing that, in consideration of such submission, they would pay whatever sum should be awarded against one of said parties, it was held that the promise was without consideration, and not binding on the promisors. The promise was made in consideration of the submission, which must be viewed as a past consideration, and not sufficient to support the promise: *Barlow v. Smith*, 4 Vt. 139. A subsequent written guaranty of payment for goods furnished under a precedent verbal guaranty, is supported by the obligation created by the precedent verbal promise: *Wills v. Ross*, 77 Ind. 1; 40 Am. Rep. 279.

Past seduction of a female was held a sufficient consideration to support a promise by the party to give his bond to the woman for a sum of money: *Shenk v. Mingle*, 13 Serg. & R. 29; and see *Turner v. Vaughan*, 2 Wils. 339. But it is said that it may well be doubted whether, unconnected with a compromise or some other consideration, it ought to be held sufficient: *Wiggins v. Keizer*, 6 Ind. 252. Compare *Binnington v. Wallis*, 4 Barn. & Ald. 650; *Cameron v. Baker*, 1 Car. & P. 258; *Beaumont v. Reeve*, 8 Ad. & E., N. S., 483; *Nye v. Moseley*, 6 Barn. & C. 133; *Walker v. Perkins*, 3 Burr. 1568. There is no implied promise from the father of a bastard child to the mother

to furnish it a support. But it was held that a promise by the father of a bastard to pay the stepfather for the child's support, past and future, if he would continue to support it, is valid and binding: *Wiggins v. Keizer*, 6 Ind. 252.

In most cases of executory contracts the consideration must precede their execution, but this is not to be deemed a past consideration. Though the act was previously done, yet the duty or obligation exists at the time, and this constitutes a valid consideration: *Buckley v. Landon*, 2 Conn. 404.

To constitute the rendition of future services by the payee a good consideration for the making of a promissory note, there must be some binding contract for such services, which might be enforced by the maker of the note if the payee omitted to perform the services: *Hulse v. Hulse*, 17 Com. B. 711.

5. Consideration of Promise by Widow to Pay Debt Contracted During Coverture.—At common law a married woman has no power to bind herself by contract. Independently of statutory exceptions, a married woman cannot be bound by any contract expressly made by her during her coverture, or implied against her by reason of matters arising during the same time: *Whipple v. Giles*, 55 N. H. 139; *Higgins v. Peltzer*, 49 Mo. 152; *Aultman v. Rush*, 26 S. C. 517. She is not bound by a promissory note given during coverture, although at the time of the marriage she had, by inheritance, both real and personal estate, unless it be shown that such estate was held to her sole and separate use, and that the promise was made in respect to that estate: *Shannon v. Canney*, 44 N. H. 592; and see *Kantrowitz v. Prather*, 31 Ind. 92; 99 Am. Dec. 587, and note 598; *Yale v. Dederer*, 22 N. Y. 450; 78 Am. Dec. 216, and note 226, in which cases and the accompanying notes this branch of the subject is fully considered.

But some of the authorities give support to the position that a moral obligation on the part of a *feme covert* is sufficient to uphold her promise made after the removal of her disability. In an English case, such promise was held to be binding: *Lee v. Muggerridge*, 5 Taunt. 37; and see *Goulding v. Davidson*, 26 N. Y. 604. So, a *feme covert*, who retained counsel in a suit prosecuted by her for a divorce, was held liable to him for his fees, upon a promise to pay made by her subsequent to the divorce. The previous services for her benefit, and at her request, would constitute a moral obligation sufficient to uphold the promise made after the removal of the disability: *Wilson v. Burr*, 25 Wend. 386. But directly the opposite is held in *Musick v. Dodson*, 76 Mo. 624; 43 Am. Rep. 780, and see note thereto, 785. So it was held that the subsequent promise of a widow to pay a physician for professional services rendered her during her coverture was not founded upon a sufficient consideration: *Kennerly v. Martin*, 8 Mo. 698. So where a wife whose husband had deserted her, and while living apart from him, gave her note for necessities used by her in her own support, the note was held void, and that her promise to pay it, made after her divorce and before her remarriage, was without consideration and invalid: *Hayward v. Barker*, 52 Vt. 429; 36 Am. Rep. 762, and see note 764; *Hetherington v. Hixon*, 46 Ala. 297. So where a married woman borrowed money, it was held that a promise made by her after the death of her husband to repay it was incapable of having vitality or binding force given to it, without some new and valuable consideration: *Maher v. Martin*, 43 Ind. 314. But, in Pennsylvania, the indebtedness of a married woman is thought to be a sufficient consideration to support a promise made by her after the coverture is removed: See *Hempill v. McClimans*, 24 Pa. St. 367; *Brown v. Bennett*, 75 Pa. St. 420; *Trout v.*

McDonald, 83 Pa. St. 144. And such indebtedness is held a sufficient consideration to support an obligation under seal by a third person to pay it: *Leonard v. Duffin*, 94 Pa. St. 218.

It was held by the Arkansas court that the contract of a married woman for professional services in obtaining a divorce may be enforced, upon her express promise to pay, after she becomes discovert, without any new or further consideration for the promise. This opinion is rested upon the ground that the promise was binding, not by force of any mere moral obligation resting upon her, but because the contract or agreement made during coverture, whereby she received an advantage, and the other party suffered a disadvantage, was of such a nature as to be valid and binding upon her estate as a *feme covert*, and a sufficient consideration to uphold her promise as a *feme sole*: *Viser v. Bertrand*, 14 Ark. 267, 273. So, the doctrine is well sustained by authority that when necessities are furnished to a married woman on the faith of her separate estate, there is such a moral obligation to pay the debt as will support an action at law on a promise to pay after the coverture has ceased: *Vance v. Wells*, 8 Ala. 399; *Sherwin v. Sanders*, 59 Vt. 499; 59 Am. Rep. 750; and see *Goulding v. Davidson*, 26 N. Y. 604; *Hubbard v. Bugbee*, 55 Vt. 506; 45 Am. Rep. 639; *Hubbard v. Bugbee*, 58 Vt. 172; *Rusling v. Rusling*, 47 N. J. L. 1. And the contract of a married woman to pay a valid debt of her husband out of her separate estate creates a moral obligation which is held sufficient consideration to support a bond and mortgage for the same debt executed after her husband's death: *Holden v. Banes*, 140 Pa. St. 63. But where a married woman, having a separate estate, but living with her husband, contracted debts without charging them specifically on her estate, and, after her husband's death, promised, without any consideration, to pay such debts, the promise was held void: *Felton v. Reid*, 7 Jones, 269. At common law, the contract of a married woman is void; and where the original contract entered into by her is in itself the whole consideration upon which the new promise rests, if that contract was wholly void it alone will not sustain a subsequent promise to fulfill it: *Loyd v. Lee*, 1 Strange, 94. But where there is, beyond the void agreement, a moral obligation or duty, arising from benefit received or otherwise, which would raise an implied promise, except for the disability to make a promise, which the law imposes, a promise made after the disability is removed can rest upon this benefit and duty as a sufficient consideration: *Goulding v. Davidson*, 26 N. Y. 604, 620. Recognition of this principle will be found in several of the cases above cited. It was held that a subsequent promise to pay a debt absolutely void under the statute against usury, in force when it was contracted, may be supported upon the original consideration: *Flight v. Reed*, 1 Hurl. & C. 702.

6. *Sufficiency of Consideration to Support Promise Considered in Some Miscellaneous Cases.*—See, as to consideration of new promise made by infant after attaining full age, *Craig v. Van Belber*, 100 Mo. 584; 18 Am. St. Rep. 569, note 706. In this note the subject of the contracts of infants is fully and exhaustively discussed.

The doctrine that a moral obligation is sufficient to support an undertaking to pay a debt, which cannot be collected by reason of the intervention of some positive law, is admitted to be applicable in the case of a debt barred by a judgment. But such a debt is put on a higher footing than a debt barred by the statute of limitations, which requires no greater evidence of a promise to pay it than a distinct and unequivocal admission of continued responsibility for it; while, to enable a plaintiff to recover a debt barred by

a judgment, there must be not only an acknowledgment of the debt, but a distinct and formal promise to pay or allow it: *Anspach v. Brown*, 7 Watts, 139. In a recent case, a moral obligation was held sufficient to support an assumption to pay a debt barred by a report of county auditors, which was properly filed and had become a judgment, and from which no appeal was taken: *Stebbins v. County of Crawford*, 92 Pa. St. 289; 37 Am. Rep. 687. The promise was none the less binding, because it was made to the clerk of the commissioners and the county treasurer: *Stebbins v. County of Crawford*, 92 Pa. St. 289; 37 Am. Rep. 687.

It is an elementary rule of law that where parties get all the consideration they bargained for, they cannot be heard to complain of the want or inadequacy of the consideration: *Smock v. Pierson*, 68 Ind. 405; 34 Am. Rep. 269; *Neidefer v. Chantain*, 71 Ind. 363; 36 Am. Rep. 198; *Chicago etc. R. R. Co. v. Derkes*, 103 Ind. 520. A value, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on the contract or promise: *Judy v. Louderman*, 48 Ohio St. 562; *Pilkington v. Scott*, 15 Mees. & W. 657; *Haigh v. Brooks*, 10 Ad. & E. 309, 320; *Whitefield v. McLeod*, 2 Bay, 380; 1 Am. Dec. 650. A promissory note executed in consideration of a father's naming a child after the promisor, and in pursuance of the promisor's agreement that if the child were so named he would provide for its education and support, is based upon a sufficient consideration: *Wolford v. Powers*, 85 Ind. 294; 44 Am. Rep. 16; and see *Parks v. Francis*, 50 Vt. 626; 28 Am. Rep. 517. Abstinence from the use of intoxicating liquors was held to furnish a good consideration for a promissory note: *Lindell v. Rokes*, 60 Mo. 249; 21 Am. Rep. 395. And to the same effect is *Hamer v. Sidway*, 124 N. Y. 538; 21 Am. St. Rep. 693. In the latter case it is held not essential to make out a good consideration for a promise to show that the promisor was benefited or the promisee injured. A waiver on the part of the latter of a legal right is sufficient. In *Cowee v. Cornell*, 75 N. Y. 91, 31 Am. Rep. 428, a note for services was sustained, although the amount was twenty thousand dollars, and very greatly in excess of the value of the services: See, also, *Eurl v. Peck*, 64 N. Y. 596. It is stated as a general principle that if one contracts for the performance of an act which will afford him pleasure, gratify his ambition, please his fancy, or express his appreciation of a service another has done him, his estimate of the value should, in the absence of fraud, be left undisturbed: *Wolford v. Powers*, 85 Ind. 294; 44 Am. Rep. 16.

Goods furnished to a third party at the maker's request are held to constitute a good consideration for a note given in payment for the goods: *Lipsmeier v. Vehlslage*, 29 Fed. Rep. 175. A release from a contract to marry is a good consideration for a promise by the party accepting such release to pay money therefor: *Snell v. Bray*, 56 Wis. 156. Such a transaction amounts to a substitution of one contract for another, the consideration of the original contract being the consideration for the substituted contract: *Brown v. Everhard*, 52 Wis. 205. An agreement by one to discharge a person in his employ is a sufficient consideration for a promise by another to pay a specified sum of money therefor, and is not *per se* illegal: *In re Cater*, 33 Minn. 529. An equitable consideration is held sufficient to support a contract: *Wills v. Ross*, 77 Ind. 1; 40 Am. Rep. 279. And the promise of a husband, who has borrowed money of his wife, to pay it to her children, is an equitable consideration which will support the assignment of a promissory note from the husband to one of the children: *Proctor v. Cole*, 104 Ind. 373. An express promise by a husband to his wife to pay her money to help to sup-

port her and their child, does not change their relative rights and obligations, and is not supported by a legal consideration, and a promissory note given for the same purpose to the wife, or to a third party for her benefit, is within the same principle: *Fuller v. Lambert*, 78 Me. 325. And a husband's promise during coverture to pay an antenuptial debt of his wife, in consideration of his existing liability, creates no new legal liability, but leaves the debt and the parties as they were before: *Cole v. Shurtleff*, 41 Vt. 311; 98 Am. Dec. 587.

A rule sustained by the weight of authority is, that where several persons promise to contribute to a common object desired by all, the promise of each is a good consideration for the promise of the others, and can be enforced by suit when the corporation or person to whom the subscription runs has incurred obligations on the faith of such subscriptions, and has complied with the conditions upon which they were made: *Premont Bridge Co. v. Fuhrman*, 8 Neb. 99, 103; *Homan v. Steele*, 18 Neb. 652; and see *Presbyterian Church v. Cooper*, 112 N. Y. 517; 8 Am. St. Rep. 767, and note 771. A subscription becomes a contract when accepted by the beneficiary, and is acted upon by the incurring of an obligation or expenditure of money: *University of Des Moines v. Livingston*, 57 Iowa, 307, 311; 42 Am. Rep. 42; *McCabe v. O'Connor*, 69 Iowa, 134; *Caul v. Gibson*, 3 Pa. St. 416; *Methodist Church v. Garvey*, 53 Ill. 401; 5 Am. Rep. 51. And a mutual subscription for the benefit of any unincorporated society organized for a lawful purpose may be supported, even though no payee is named, if the object is made definite and certain. The mutual promise of the subscribers is a sufficient consideration: *Allen v. Duffie*, 43 Mich. 1; 38 Am. Rep. 159.

A promise to pay a debt for which the promisor is already bound does not constitute a sufficient consideration to support a contract: *Ritenour v. Mathews*, 42 Ind. 7; *Laboyteaux v. Swigart*, 103 Ind. 596. And a promise generally to pay on request what the promisor was liable to pay on request in another right is without consideration and void: *Cole v. Shurtleff*, 41 Vt. 311; 98 Am. Dec. 587. As to the general rule is that an agreement to do, or the doing of that which one is already bound to do, constitutes no consideration for a new promise: *Vanderbilt v. Schreyer*, 91 N. Y. 392, 401; *Ayres v. Railroad Co.*, 52 Iowa, 478; *Schuler v. Myton*, 48 Kan. 282. An agreement by a creditor to release a debtor will constitute a valid consideration for a contract: *Crowder v. Reed*, 80 Ind. 1; *Kester v. Hulman*, 65 Ind. 100. And if there be a dispute between parties, and the claim asserted is not entirely groundless, a promise to forbear the prosecution of the claim is founded on a sufficient consideration: *Harris v. Cassady*, 107 Ind. 158; and see *Luark v. Malone*, 34 Ind. 444; *Darison v. Ford*, 23 W. Va. 617; *Brown v. Sloan*, 6 Watts, 421; *Longbridge v. Dorville*, 5 Barn. & Ald. 117. But where a claim is entirely without foundation, a release will not constitute a valid consideration: *Harris v. Cassady*, 107 Ind. 158; *Martin v. Black*, 20 Ala. 309; *New Hampshire Sav. Bank v. Colcord*, 15 N. H. 119; 41 Am. Dec. 685. The release of a party from the performance of a contract constitutes a sufficient consideration for his promise to account with the other party for moneys paid by the latter under the contract: *Cutter v. Cochrane*, 116 Mass. 408. The release by one party to a contract containing mutual stipulations is the consideration for the release by the other, and the mutual releases form the consideration for the new promise, and are sufficient to give it full legal effect: *Cutter v. Cochrane*, 116 Mass. 408; *Rollins v. Marsh*, 123 Mass. 116; *Perry v. Buckman*, 33 Vt. 7; *McCreery v. Day*, 119 N. Y. 1; 16 Am. St. Rep. 793; *Oregon etc. R. R. Co. v. Forrest*, 128 N. Y. 83; *Manufacturing Co.*

v. Bradley, 105 U. S. 175. When a person incurs a legal liability, as by entering into a contract with a third person, the liability thereby incurred is a sufficient consideration to support a promise by the person at whose request it was incurred. If, for instance, a person contracts in his own name to purchase property upon the promise by another to provide the money to pay for it, the consideration is sufficient to support the contract; *Skidmore v. Bradford*, L. R. 8 Eq. 134; *Steele v. Steele*, 75 Md. 477. But a promise of this kind ought to be established by the clearest and most satisfactory proof; *Steele v. Steele*, 75 Md. 477.

EDWARDS v. CHARLOTTE, COLUMBIA, AND AUGUSTA RAILROAD COMPANY.

[89 SOUTH CAROLINA, 472.]

SURFACE WATER—RAILROAD EMBANKMENT.—A railroad company may lawfully protect its right of way against the flow of surface water by building an embankment thereon, and it is not liable in damages to an adjoining owner whose land is overflowed from an accumulation of surface water caused by such embankment.

SURFACE WATER—RIGHTS OF RAILWAY COMPANY.—A railroad company has the same rights as a private landowner to protect its right of way against the flow of surface water.

Henderson Brothers and John R. Cloy, for the appellants.

Croft and Chafee and B. L. Abney, for the appellee.

473 McIVER, C. J. The plaintiff, who is a married woman, joining her husband with her as a coplaintiff, brings this action against the Charlotte, Columbia, and Augusta Railroad Company to recover damages alleged to have been done to her property, as well as to her health, by reason of the obstruction by the defendant company of the natural flow of surface water over and across the right of way and railroad track of defendant. The allegations in the complaint substantially are, that some time in the year 1867 the defendant company constructed its railway through the town of Graniteville, over and along Canal street of said town, running north and south parallel with Horse creek, a natural watercourse, on the west of the railway; that plaintiff is the lessee of certain premises situate at the northeast corner of Canal street and Cottage, the latter being a street running perpendicular to the former; that on the eastern side of the town of Graniteville the land is hilly, and gradually slopes towards Horse Creek, and that the surface water, which would accumulate on the eastern side, was accustomed to flow, in part, down and along Cottage street, across Canal street, to said

Horse creek, previous to the construction of defendant's road, and for some time afterwards, without injury to plaintiff's premises, but that some time in the year 1878 "the defendant negligently, unlawfully, and unnecessarily" erected a large sandbank at the intersection of Canal and Cottage streets, whereby the surface water was forced back on plaintiff's premises, and has continued to maintain and increase said sandbank.

The defendant claims that the sandbank complained of (which was constructed on defendant's right of way) was necessary ⁴⁷⁴ to protect its roadbed and right of way from being undermined and washed away by the flow of the surface water, and, therefore, its construction was no invasion of the legal rights of the plaintiff, and the defendant is not liable for any damages which plaintiff may have sustained by reason of such obstruction of the flow of the surface water. The circuit judge, in effect, charged the jury that the first question for them to determine was whether the construction of the sandbank was necessary for the protection of defendant's roadbed and right of way, and if so, then the defendant was not liable. The jury, under this instruction, found a verdict in favor of the defendant, and judgment being entered thereon, the plaintiff appeals upon the several grounds set out in the record. Under the view which we take, we do not deem it necessary to repeat these grounds, for the whole case, in our judgment, turns upon the inquiry whether there was any error in the instruction thus given to the jury.

It is not, and cannot be, denied that the rule in regard to interference with the flow of surface water is wholly different from that which prevails in regard to the waters of a natural watercourse. We shall, therefore, confine our attention entirely to the rule as to surface water. What that rule is has been the subject of debate in numerous cases in the other states, many of which we have examined in preparing this opinion. Some of the states have adopted what is known as the civil-law rule, while others seem to have adopted what is designated as the intermediate rule, while others again (a majority of the states, as is said in a note to *Goddard v. Inhabitants of Harpswell*, 30 Am. St. Rep. 391) adhere to the rule of the common law. In this state, so far as we are informed, there is no adjudication upon the subject, for what was said upon the subject by the late Chief Justice Simpson was "not intended as a final adjudication, and conclusive of

said question in the future," as he himself expressly said in that opinion, but simply his own opinion as to the comparative merits of the several rules.

But in view of the express declaration of the law-making power, as embodied in section 2738 of the General Statutes, we ⁴⁷⁵ feel bound to declare, in the absence of any constitutional provision, statute, or even authoritative decision to the contrary, that the common-law rule must still be recognized as controlling here, for that section expressly declares that: "Every part of the common law of England not altered by this act, nor inconsistent with the constitution of this state and the customs and laws thereof, is hereby continued in full force and virtue within this state in the same manner as before the passage of this act." Under the common-law rule surface water is regarded as a common enemy, and every landed proprietor has a right to take any measures necessary to the protection of his own property from its ravages, even if in doing so he throws it back upon a coterminous proprietor to his damage, which the law regards as a case of *damnum absque injuria*, and affording no cause of action.

This rule was applied in a case very much like the present: *Rowe v. St. Paul etc. Ry. Co.*, 41 Minn. 384; 16 Am. St. Rep. 706; also in *Cairo etc. R. R. Co. v. Stevens*, 73 Ind. 278; 38 Am. Rep. 139; *O'Connor v. Fond Du Lac etc. Ry. Co.*, 52 Wis. 526; 38 Am. Rep. 753; *Johnson v. Chicago etc. R. R. Co.*, 80 Wis. 641; 27 Am. St. Rep. 76. See, also, *Chadeayne v. Robinson*, 55 Conn. 345, 3 Am. St. Rep. 55, and *Abbot v. Kansas City etc. R. R. Co.*, 83 Mo. 271, 53 Am. Rep. 581, in which the case of *Shane v. Kansas City etc. R. R. Co.*, 71 Mo. 237, 36 Am. Rep. 480, relied upon by appellant, as well as the case of *McCormick v. Kansas City etc. R. R. Co.*, 70 Mo. 359, 35 Am. Rep. 431, are commented on and practically overruled, so far as the question now under consideration is concerned. These cases, as well as many others which might be referred to, together with those cited by respondent's counsel in his argument, abundantly show that there was no error on the part of the circuit judge in giving the instruction complained of to the jury.

The case of *Staton v. Norfolk etc. R. R. Co.*, 111 N. C. 278, seems to be much relied upon by the counsel for appellant. But we do not think it in point. The question there was different from that presented ⁴⁷⁶ here, and the discussion was principally devoted to an inquiry into the rights acquired by

a railroad company from the exercise of its right to condemn lands under the power of eminent domain, with which we are not concerned here. Here we freely and fully concede the doctrine laid down in that case—that a railroad company has no higher rights, in reference to the treatment of surface water, than an individual land proprietor; and that is as far as that case is applicable to the present. Besides, as we understand, North Carolina is one of the states which recognize the civil-law rule in reference to surface water, and hence the decisions in that state would afford no assistance where the common-law rule prevails. So, too, the cases of *Mills v. Greenville etc. R. R. Co.*, 13 S. C. 97, and *Wallace v. Columbia etc. R. R. Co.*, 34 S. C. 66, and again reported in 37 S. C. 335, being cases in reference to natural watercourses, and not cases of surface water, have no application to the present case. Nor are we able to discover any thing in the case of *Gregory v. Layton*, 36 S. C. 93, 31 Am. St. Rep. 857, which throws any light upon our present inquiry.

Under the view which we have taken, the other grounds of appeal become immaterial. For even if the alleged errors there complained of were well founded, the result reached would not have been affected. Assuming, as we must do, that the jury found as matter of fact that the sandbank complained of was necessary for the protection of defendant's right of way and roadbed, we are unable to see how the instructions complained of could possibly have affected the result. We may add, however, that we see no error in any of the instructions complained of.

The judgment of this court is that the judgment of the circuit court be affirmed.

RAILROADS—LIABILITY FOR SURFACE WATERS—EMBANKMENTS.—The fact that a railroad company raises an embankment upon its own land which prevents the surface water falling and running upon the land of an adjoining owner from running off such land, and causes it to accumulate thereon to its damage, gives to the latter no cause of action against the former: *Missouri Pac. Ry. Co. v. Renfro*, 52 Kan. 237; *ante*, p. 344, and note.

JENKINS v. RICHMOND AND DANVILLE R. R. Co.

[99 SOUTH CAROLINA, 507.]

RAILROADS—FELLOW-SERVANTS.—A railroad company is not liable to one of its agents for an injury arising from the negligence of another competent agent.

MASTER AND SERVANT—LIABILITY FOR NEGLIGENCE OF FELLOW-SERVANTS.

A master who uses due diligence in the selection of competent and trusty servants, and furnishes them with suitable means to perform the services in which he employs them, is not answerable to one of them for an injury received in consequence of the carelessness or negligence of another while both are employed in the same service.

RAILROADS—FELLOW-SERVANTS—WHO ARE.—A conductor on a freight train and an assistant fireman on a following freight train, both belonging to the same company, are fellow-servants, and take the risk of each other's negligence.

MASTER AND SERVANT—FELLOW-SERVANTS—WHO ARE.—All persons employed under one principal in the conduct of one enterprise, such as operating a railroad, are the servants of one master, and therefore fellow-servants of each other.

MASTER AND SERVANT—FELLOW-SERVANTS—RANK AS AFFECTING.—Whether persons engaged in the same employment are fellow-servants or not does not depend upon their rank, grade, or authority. All who serve the same master, work under the same control, derive authority and compensation from the same source, are engaged in the same general business, though in different grades or departments of it, are fellow-servants who take the risk of each other's negligence.

MASTER AND SERVANT—FELLOW-SERVANTS—HOW DETERMINED.—Whether parties are fellow-servants is not to be determined by the rank or grade of the offending or injured servant, but is to be determined by the character of the act being performed by the offending servant. If it is an act that the law implies a contract duty on the part of the employer to perform, then the offending employee is not a servant, but an agent; as to all other acts they are fellow-servants.

RAILROADS—FELLOW-SERVANTS.—A railway company which furnishes a safe track and competent servants is not liable for the result of a collision arising from its track being temporarily dangerous at the time by the omission of its servant to give the usual and necessary notice of an obstruction thereon to a fellow-servant on an approaching train, which results in an injury to such fellow-servant.

A. Crawford and Alston and Patton, for the appellant.

B. L. Abney, for the appellee.

507 MCGOWAN, J. This action was brought by the plaintiff, an employee of the defendant, for the recovery of damages sustained by him through the negligence of the defendant company. The case came on for trial before his honor, Judge Wallace, and the defendant company interposed an oral demurrer that the complaint did not state facts sufficient to constitute a cause of action against the defendant. The

judge, without stating his reasons, sustained the demurrer and dismissed the complaint. From this order the plaintiff appeals to this court upon one general ground, that the judge erred in sustaining the demurrer.

508 Upon this state of the pleadings the facts well alleged must be assumed to be true; and therefore it is necessary to set out the important allegations made. He complains, substantially, as follows: "That the plaintiff, John H. Jenkins, on March 3, 1890, at the time of committing the grievances hereinafter complained of, was in the employment of the defendant as an assistant fireman upon a locomotive engine, No. 135, the property of the said defendant, driven by steam upon its road; and it was the duty of the defendant to provide an unobstructed track for said engine running upon its track, and to give warning of any obstruction thereon by placing torpedoes on the track, and signaling said engine at a distance therefrom remote enough to enable the engineer to avoid a collision therewith, by the employment of the appliances used in stopping engines, trains, etc. That on the said March 3, 1890, while the plaintiff, in the performance of his duty as aforesaid on the locomotive engine No. 135, was going north from Columbia over the defendant's road, and at a point thereon about two and one-half miles from said city, there were standing on defendant's track, on the line of the Columbia and Greenville railroad, several cars in charge of the conductor of the train from which they had broken loose, and which had preceded by fifteen or twenty minutes said engine No. 135 in its progress up the road as aforesaid.

"That the defendant, its agents and servants in charge of the loose cars as aforesaid, not regarding their duty, conducted themselves so carelessly, negligently, and unskillfully, that they failed to make said obstruction known to those in charge of the approaching engine No. 135 in time to stop the same, either by placing torpedoes on the track or by signaling the engineer running said engine, at a point sufficiently removed from said obstruction wherein it was possible to stop said engine, as is required by the rules and regulations governing the running of engines on the road of the above-named defendant. That for the want of due care and attention to the duty devolving upon the said defendant, its agents and servants as aforesaid, at the time and place aforesaid, and while the said loose cars were in the use and service of said defendant, and in charge of one of its conductors as aforesaid, on the track

of the said railroad, ⁵⁰⁹ and while the plaintiff was in the performance of his duty in the capacity as aforesaid, in the service of said defendant, by reason of the carelessness, negligence, and recklessness of the said defendant, its agents and servants, in failing to give proper signals, which would have stopped the approaching engine in time to avoid all possibility of a collision, this plaintiff, to save his life, was forced to leap from said engine while it was running rapidly over said track, just before it reached said obstruction, whereby his arm was broken at the wrist, causing a permanent injury; and he was for days and weeks unable to work at all, and can never perform a man's full share of manual labor, owing to said permanent injury, and his sufferings, both mental and physical, were intense and continued until his wound healed; all to his damage nineteen hundred and fifty dollars."

The principles upon which a railroad company is responsible to a stranger or to passengers transported for a consideration, are reasonably well defined and understood by the profession. But a corporation must of necessity act through agents, and the relations between the ideal existence known as the corporation and its own employees for hire are not at all so clear or well defined. On the contrary, there is some confusion and much difference of opinion on the subject; so much so, that the doctrines as to "fellow-servants" and responsibility for their acts have been characterized by a learned judge "as a perplexing and tangled subject." Since the case of *Murray v. South Carolina R. R. Co.*, 1 McMull. 385, 36 Am. Dec. 268, decided by our then court of errors in 1841—the first of our cases on the subject, if not the first on the American continent—the general rule has been considered as established on principle and policy, "that a railroad company is not liable to one of their agents for an injury arising from the negligence of another competent agent." And in one of the latest and fullest publications which treats of the subject, the principle is stated thus: "The general rule resulting from considerations of justice as of policy is, that he who engages in the employment of another for the performance of specified duties and services for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services. ⁵¹⁰ The perils arising from the carelessness and negligence of those who are in the same employment are no exceptions to this rule; and where a master uses due diligence in the selection of compe-

tent and trusty servants, and furnishes them with suitable means to perform the services in which he employs them, he is not answerable to one of them for an injury received by him in consequence of the carelessness of another, while both are engaged in the same service. . . . The rule thus established was almost universally followed, and the labor of the courts since has been in properly applying it and determining its principal limitations," etc.: See 7 Am. & Eng. Ency. of Law, 823, and numerous cases cited.

The plaintiff here was an assistant fireman on train No. 2, injured, as alleged, by the negligence of "the agents and servants" (without indicating which) of the defendant company on another train, No. 1, in not giving timely notice of certain "loose cars" being on the track of the company; and he, the plaintiff, claims that the judge committed error in holding that the conductor on train No. 1, and the assistant fireman on train No. 2, were fellow-servants in the sense of the rule. The employees of a railroad are generally numerous, and necessarily divided into classes, according to the work assigned them. But all of the persons thus employed, under one principal, in the conduct of one enterprise, such as operating a railroad, are, according to the ordinary meaning of the word, servants or employees of one principal, and, as it would seem, "fellow-servants" of each other.

But it is said that, by successive decisions of the courts, the rule has been modified, and, according to the limitations imposed, the parties here were not technically "fellow-servants." After some conflict, we suppose it may be regarded as settled that, whether parties are "fellow-servants" in the sense of the rule, does not depend upon the grade, rank, or authority of the two servants. A fireman and engineer or conductor are "fellow-servants." Judge Cooley states that persons are "fellow-servants, when they engage in the same common pursuit, under the same general control": Cooley on Torts, 541. Judge Thompson, in his work on Negligence, announces as a general ⁵¹¹ rule, that all who serve the same master work under the same control, derive authority and compensation from the same common source, are engaged in the same general business, though it may be in different grades or departments of it, are fellow-servants, who take the risk of each other's negligence." Or, in the forcible view of Judge Brewer, lately appointed associate justice of the supreme court of the United States, in the case of *Howard v. Denver etc.*

Ry. Co., 26 Fed. Rep. 837 (1886): "Neither can it be said that Ryan and decedent were engaged in a different class of work. True, they were on different trains, and at the time of the accident had no opportunity of noticing the conduct of each other until too late to prevent the collision. But being engaged in the same kind of service, they must naturally have been often thrown into contact, and had ample opportunities for mutual supervision. . . . He who engages in train service knows that other trains besides his will be running, and may fairly be considered as contracting to take the risk of the negligence of the employ  es managing such trains. He must expect to be employed now on one train and now on another, to be thus thrown into contact with the other employees in that service, to know himself what is proper care in such work, and be able to detect any evidence of carelessness on the part of those in like service": See *Howard v. Denver etc. Ry. Co.*, 26 Fed. Rep. 837; *Newport News etc. Co. v. Howe*, 52 Fed. Rep. 362; *Norfolk etc. R. R. Co. v. Donnelly*, 88 Va. 853 (1892).

But it is said that there is one limitation to the general rule which has been well established, and it is this: that while the question as to whether parties are fellow-servants is not to be determined by the rank or grade of the offending or injured servant, "it is to be determined by the character of the act being performed by the offending servant. If it is an act that the law implies a contract duty on the part of the employer to perform, then the offending employee is not a servant, but an agent; but as to all other acts they are fellow-servants." As we understand it, this is the rule which has been adopted in this state: See *Gunter v. Graniteville Mfg. Co.*, 18 S. C. 512 270; 44 Am. Rep. 573; and *Calvo v. Charlotte etc. R. R. Co.*, 23 S. C. 529; 55 Am. Rep. 28. In these cases the chief justice announced the doctrine as follows: "The true question is, whether the person in question is employed to do any of the duties of the master. If so, then he cannot be regarded as the fellow-servant or colaborer of the operatives, but is the representative of the master, and any negligence on his part in the performance of the duty of the master thus delegated to him must be regarded as the negligence of the master." This we have held to be the true test; and the only question now is, whether it is applicable to and must rule this case.

Let us see what is the proper construction of this limitation.

As we have seen, the employees of a railroad company are necessarily divided into classes, to each of which, in the division of labor, certain specified ordinary duties are assigned, as to which each servant, within the compass of his employment, in one sense, is the representative of the company. Is it the intention that "the duties of the master" referred to as changing the character of an employee into that of master should include those matters of ordinary regulation and management, or only those original and essential duties implied by the contract of service; such, for instance, as the duty of keeping a safe and sound track, furnishing all proper appliances, competent servants, etc.? But be this as it may, competent authority has indicated the following as "the duties of the master" referred to, viz: to furnish suitable machinery and appliances, and keep them in repair; the selection and retention of sufficient and competent servants, and the establishment of proper rules and regulations, etc. Under the head of "appliances" is understood to be included a proper roadway, or, as it has come to be phrased, "a safe track and a safe place to work."

Did the company directly or indirectly violate any of these fundamental contract duties in this case? It will be observed that there is no allegation in the complaint that the cars were "loose" on the track from any fault or negligence on the part of the servants on train No. 1, nor any distinct allegation as to the time when they were detached, or, indeed, in what manner ⁵¹³ the accident occurred; nor is there any allegation that the track was not safe or sufficient, or that there was wanting suitable appliances or competent servants. As we read it, the only allegation of fact made by the complaint was one not of commission, but of omission—that the servants on train No. 1 did not give proper signals, which would have stopped the train approaching in time to avoid the collision. This is entirely a different case from that of *Calvo v. Charlotte etc. R. R. Co.*, 23 S. C. 529, 55 Am. Rep. 28, where one Wooten, a section master and supervisor of the track-laying force, disregarding the signal carried by a preceding train, which indicated that it was to be followed by another, did not wait for that other train, but at once took up the track, making a gap in the road, which derailed the engine and inflicted the injury complained of. It thus appears that there was not only a failure to furnish a safe track, but really the destruction of it. The facts of this case are essentially

different; and we may adopt as applicable to this the statement of a learned judge, lately made in one of the numerous cases on the subject: "So far as the place and machinery, both were safe. There is no pretense that the track was not in good order, or that the engines and other implements for the movement or control of the train were not sufficient. It will not do to say that because Ryan's engine was in the way and collided with decedent's train, the track was not clear, and therefore the master had failed in his duty of providing a 'safe place' for the employees to work in and upon. The negligent use by one employee of perfectly safe machinery will seldom be adjudged a breach of the master's duty of providing a safe place for the employees. Such a construction would make any negligent misplacement of a switch, any collision of trains, even any negligent dropping of tools about a factory, a breach of the duty of providing a 'safe place.' The true idea is, that the place and the instruments must in themselves be safe, for this is what the master's duty fairly compels, and not that the master must see that negligent handling by an employee of the machinery shall not create danger," etc.

We cannot doubt that the employees of train No. 1 and the plaintiff on No. 2 were fellow-servants when the plaintiff 514 jumped and broke his arm, without such fault or negligence on the part of the company as to make them liable for damages; and, therefore, we think the circuit judge committed no error of law in dismissing the complaint.

The judgment of this court is that the judgment of the circuit court be affirmed.

MASTER AND SERVANT—WHO ARE FELLOW-SERVANTS.—All employees of a railroad company engaged in the operating service, connected with the business of running trains, are fellow-servants: *Louisville etc. Ry. Co. v. Petty*, 67 Miss. 255; 19 Am. St. Rep. 304. All who are servants of a common master, engaged in the same general business, subject to the same general control, and paid out of a common fund, are fellow-servants: *Georgia Pac. Ry. Co. v. Davis*, 92 Ala. 300; 25 Am. St. Rep. 47, and note; *Sherrin v. St. Joseph etc. Ry. Co.*, 103 Mo. 378; 23 Am. St. Rep. 881, and note with the cases collected; *Bier v. Jeffersonville etc. R. R. Co.*, 132 Ind. 78; *Sullivan v. New York etc. Ry. Co.*, 62 Conn. 209. See, also, the notes to *Peterson v. Chicago etc. Ry. Co.*, 11 Am. St. Rep. 569; *Richmond etc. Ry. Co. v. Norment*, 10 Am. St. Rep. 835; *Krogg v. Atlanta etc. R. R.*, 4 Am. St. Rep. 84; *Fisk v. Central Pac. R. R. Co.*, 1 Am. St. Rep. 32; and *McGuirk v. Shattuck*, ante, p. 454.

MASTER AND SERVANT—FELLOW-SERVANTS—RANK AS AFFECTING.—The liability of a master depends upon the character of the act in the perform-

ance of which the injury arises, and not upon the grade or rank of the employee whose negligence causes it: *Ell v. Northern Pac. R. R. Co.*, 1 N. Dak. 336; 26 Am. St. Rep. 621, and note; *McElligott v. Randolph*, 61 Conn. 157; 29 Am. St. Rep. 181, and note; *Georgia Pac. Ry. Co. v. Davis*, 92 Ala. 300; 25 Am. St. Rep. 47; *Lewis v. Scipert*, 116 Pa. St. 628; 2 Am. St. Rep. 631, and note. Whether or not two persons, at a given time, are fellow-servants, is not a question of rank: *Justice v. Pennsylvania Co.*, 130 Ind. 321; *Davies v. Southern Pac. Co.*, 98 Cal. 19; 35 Am. St. Rep. 133, and note; *McMaster v. Illinois Cent. R. R. Co.*, 65 Miss. 264; 7 Am. St. Rep. 653, and note.

MASTER AND SERVANT—MASTER'S LIABILITY FOR NEGLIGENCE OF FELLOW-SERVANT.—A master is not liable for injuries personally suffered by his servant through the negligence of his fellow-servants while engaged in a common employment, unless the master was negligent in securing an incompetent servant: *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409; 19 Am. St. Rep. 180, and note; *Williams v. Missouri Pac. Ry. Co.*, 109 Mo. 475; *Higgins v. Missouri Pac. Ry. Co.*, 104 Mo. 413. The general rule is, that a master is not answerable to a servant for injuries inflicted on him by the negligence of another servant in the same common employment, and not traceable to the negligence of the master: *Fisk v. Central Pac. R. R. Co.*, 72 Cal. 38; 1 Am. St. Rep. 22, and note; *Theleman v. Moeller*, 73 Iowa, 108; 5 Am. St. Rep. 663, and note; *Wilson v. Dunreath etc. Quarry Co.*, 77 Iowa, 429; 14 Am. St. Rep. 304, and note; *Ross v. Walker*, 139 Pa. St. 42; 23 Am. St. Rep. 160, and note; *Long v. Coronado R. R. Co.*, 96 Cal. 269; *Barlow v. Standard Steel Casting Co.*, 154 Pa. St. 130; *Snyder v. Viola Mining etc. Co.*, 2 Idaho, 771; *Mensch v. Pennsylvania R. R. Co.*, 160 Pa. St. 598; *Thyng v. Fitchburg R. R. Co.*, 156 Mass. 13; 32 Am. St. Rep. 425. See, further, the extended note to *Adams v. Iron Cliffs Co.*, 18 Am. St. Rep. 455.

CASES
IN THE
SUPREME COURT
OF
SOUTH DAKOTA.

WELLS v. PENNINGTON COUNTY.

[2 SOUTH DAKOTA, 1.]

PUBLIC LANDS—HIGHWAYS THEREON.—The act of Congress providing "that a right of way for the construction of highways over public lands not reserved for public use is hereby granted," and the act of the legislature of this state declaring that all section lines shall be and are public ways as far as practicable, and that the public highways along section lines shall be sixty-six feet wide, taken from each side of such lines, together constitute as to lands along the section lines an express public grant and dedication for highway purposes, and a subsequent settler upon, and purchaser of, such land receives his title in subordination to the right of the public to use the land adjacent to the section lines as a public highway.

PUBLIC LANDS, GRANT OF, FROM WHAT LANGUAGE IMPLIED.—The words in an act of Congress, "the right of way for the construction of highways over public lands not reserved for public use is hereby granted," import an immediate transfer of interest, not a promise to transfer in the future, and when highways are located by competent authority or by public use, the dedication takes effect by relation as of the date of the act.

GRANTS, PARTIES TO.—THE PUBLIC is an ever-existing grantee capable of taking dedications for public use. Therefore, a general grant of a right of way over public lands for highway purposes cannot be avoided for want of a grantee.

PUBLIC LANDS.—SETTLEMENT ON THE PUBLIC LANDS CONFERS NO RIGHTS as against the government or its grantees.

PUBLIC LANDS.—A SETTLER ON THE PUBLIC LANDS ACQUIRES NO VESTED RIGHTS THEREIN until he has entered the same at the proper land-office, and obtained a certificate of entry. Before then the land is subject to the absolute disposing power of Congress.

Charles W. Brown, state's attorney of Pennington county, and William Gardner, for the appellant.

Chauncey L. Wood, for the respondent.

⁴ BENNETT, J. This action was brought by appeal to the circuit court of Pennington county from the decision of the board of county commissioners of said county, rejecting plaintiff's claim for damages filed with said board. The complaint alleges that on the first day of April, 1885, the county of Pennington, by one John P. McElroy, a road supervisor of said county, without notice or other legal proceedings took and appropriated the private property of the plaintiff for public use, to wit, certain lands lying along the regularly surveyed section lands, for a public highway, and on account of the taking and appropriation of said lands the plaintiff is damaged in the sum of four hundred dollars. The complaint further alleges that at the time of said appropriation the plaintiff had not received a patent from the United States for the land so taken, but afterwards, on the sixth day of November, 1886, he did receive his patent, and on the twenty-first day of January, 1887, he duly asserted his claim for damages on account of such taking and appropriation of his property. The defendant answered, denying all the allegations of the complaint; and for a further answer alleged: 1. That plaintiff, prior to the filing of the complaint, had conveyed by warranty deed to one George Hunt all of the premises so alleged to have been taken, and that he did not, either in the warranty deed or otherwise, reserve or except to himself any claim or demand for damages by reason of said land being taken or used for a public highway; 2. That the tracts of land in question were first surveyed by the United States in July and August, 1879, and the official plat filed in the proper land-office of the United States on the eighteenth day of February, 1880, and prior to that time they were unsurveyed public lands of the United States. That the plaintiff first settled on these lands on the twenty-eighth day of January, 1879, and on the sixteenth day of June, 1883, made his final proof to establish his right thereto under the pre-emption laws of the United States, ⁵ and received his final receipt. That the private property of plaintiff, alleged to have been taken or appropriated by the defendant for public highways, consisted of certain strips of land thirty-three feet wide, situated on each side of section lines, lying and being along and between the said sections, which said strips and section lines are practicable public highways or roads, and are now, and at all times since the first day of April, 1885, have been, used and traveled by the general public. On the

twenty-ninth day of March, 1890, the issues were tried by a jury, verdict rendered for the plaintiff, damages assessed at two hundred and seventy-five dollars, and judgment entered. A motion for a new trial was made and overruled, an appeal was perfected, and a large number of errors were duly assigned. Upon the trial it was stipulated and agreed that the allegations of the complaint and the facts set forth in the affirmative defenses of the defendant were true, except the allegation of damages set forth in the complaint. The evidence introduced was upon the question of damages only.

The defendant and appellant relies upon but two propositions for a reversal: 1. That the complaint, taken in connection with the allegations of the affirmative defenses, does not state facts sufficient to constitute a cause of action; 2. That if the facts proved constitute a cause of action on the part of plaintiff, the errors of law committed by the court below entitle appellant to a new trial. Section 2477 of the Revised Statutes of the United States, enacted in 1866, and in force at the time of the alleged appropriation, provides "that the right of way for the construction of highways over public lands not reserved for public use is hereby granted." Sections 1189 and 1191 of the Compiled Laws, enacted prior to February 17, 1877, provide "that all section lines shall be, and are hereby, declared public highways as far as practicable." "The public highways along section lines, as declared by section 1189, shall be sixty-six feet wide, and shall be taken equally from each side of said lines, unless changed as provided in the preceding section." The contention of the appellant is, that the act of Congress above quoted freely grants the right of way over the public lands for highway purposes; that the terms thereof ⁶ may be accepted by the public, or by any state, territory, or municipality authorized to legislate for the public in the matter of highways; that the congressional act is full and sufficient authority for the passage of the territorial law; and that the two laws constituted, as to lands along the section lines, an accepted public grant, or dedication of the same, for highway purposes, prior in time to the acquisition by the plaintiff of any vested interest in such land.

The respondent contends that the grant contained in said section 2477 of the Revised Statutes of the United States is not an absolute grant, but is in the nature of a general offer by the general government, which becomes operative as a

grant only when its terms are complied with by such municipalities as the law clothes with the right to construct public highways. The territorial enactments, as set forth in sections 1189 and 1191 of the Compiled Laws, were not an acceptance of the grant, for the territory of Dakota was not clothed with authority to construct highways. These contentions present two questions for determination: 1. Was the congressional act a present, absolute grant or dedication, without reservation or exception, freely granting the right of way over the public lands for the construction of highways? 2. Were the terms of the grant accepted by the provision of the territorial law declaring all section lines to the extent of thirty-three feet on each side thereof to be public highways, as far as practicable? The language of section 2477 of the Revised Statutes of the United States indicates a grant *in præsentia*. Its words, "the right of way for the construction of highways over public lands not reserved for public use is hereby granted," import an immediate transfer of interest, not a promise of a transfer in the future. As to the intent of Congress in this enactment granting the right of way to cross the public lands, there can be no reasonable doubt. The object of the grant was to enable the citizens and residents of the states and territories, where public lands belonging to the United States were situated, to build and construct such highways across the public domain as the exigencies of their localities might require, without making themselves liable as trespassers. And when the location of the highway and roads ⁷ was made by competent authority, or by public use, the dedication took effect by relation as of the date of the act; the act having the same operation upon the lines of the road as if specifically described in it. Justice Field, in the case of *Missouri etc. Ry. Co. v. Kansas etc. Ry. Co.*, 97 U.S. 497, says: "It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted that there must exist a present power of identification of the land; that when no such power exists, instruments, with words of present grant, are operative, if at all, only as contracts to convey. But the rules of com-

mon law must yield in this, as in all other cases, to the legislative will." The grants by the United States of land to aid in the construction of railroads are in many respects analogous to this enactment. While in these grants the fee to the land was intended to be transferred to the railroad companies by their grants, and the act under consideration is only a dedication or giving a right of way, yet the principles governing the construction of the words "is hereby granted" are the same.

The courts of the United States have made many adjudications, holding, when these words are used in an act of Congress transferring a right or a fee, that the grant takes effect as of the date of the act. In the case of *Leavenworth etc. R. R. Co. v. United States*, 92 U. S. 733, the language of the act which was being construed by the court was: "There be and is hereby granted to the state of Kansas." In reference to it the court said: "It creates an immediate interest, and does not indicate a purpose to give in the future. 'There be and is hereby granted' are words of absolute donation, and import a grant *in præsentia*. This court has held that they can have no other meaning, and the land department, on this interpretation of them, has administered every previous grant." The case of *St. Joseph etc. R. R. Co. v. Baldwin*, ⁸ 103 U. S. 428, was an action by Baldwin to recover of the St. Joseph and Denver City Railroad Company damages for entering upon his lands in Nebraska, and appropriating in the construction of its road a strip two hundred feet in width and two hundred rods in length. The company claimed a right of way over the land of that width, under an act of Congress of July 23, 1866, which, among other provisions, provided "that the right of way through the public lands be, and the same is hereby, granted to the said St. Joseph and Denver City Railroad Company, . . . for the construction of a railroad . . . to the extent of one hundred feet in width on each side of said road where it may pass." When the grant was made by Congress, the land claimed by Baldwin was vacant and unoccupied land of the United States. But the line of the road over it was not definitely located until October, 1871. Baldwin acquired whatever right he had to the land in October, 1869. The company's contention was that Baldwin took the land subject to its right of way, but he contended that the grant of the right of way took effect only from the date at which the company filed its maps, designating the route, with

the secretary of the interior. With these contentions the case came before the supreme court of the United States. In deciding the case, Justice Field says: "The language of the act here, and of nearly all congressional acts granting lands, is in terms of a grant *in præsentis*. The act is a present grant. 'There is hereby granted' are the words used, and they import an immediate transfer of interest, so that when a route is definitely fixed, the title attached from the date of the act. The grant of the right of way by the sixth section contains no reservations or exceptions. It is a present, absolute grant, subject to no conditions except those necessarily implied—such as that the road shall be constructed and used for the purposes designed. Nor is there any thing in the policy of the government with respect to the public lands which would call for any qualification of the terms. Those lands would not be the less valuable for settlement by a road running through them. On the contrary, their value would be greatly enhanced thereby. . . . We see no reason, therefore, for not giving to the words of present grant, 'with respect to the right of way, the same construction which we should be compelled to give, according to our repeated decisions, to the grant of lands, had no limitations been expressed. We are of opinion, therefore, that all persons acquiring any portion of the public lands after the passage of the act in question took the same subject to the right of way conferred by it for the proposed road." The same conclusions have been reached and followed by the land department of the United States: See 1 Lester's Land Laws, p. 549, No. 578; *Hall v. State*, 2 Copp's Public Land Laws, 1048; *Cushing v. State*, 4 Dec. Dep. Int. 415; 9 Op. Att. Gen. 254; *Wright v. Roseberry*, 121 U. S. 503. The same views have been expressed by the supreme courts of several of the states: See *Fletcher v. Pool*, 20 Ark. 100; *Ringo v. Rotan*, 29 Ark. 56; *Owens v. Jackson*, 9 Cal. 322; *Kernan v. Griffith*, 27 Cal. 87; *Sacramento Valley Reclamation Co. v. Cook*, 61 Cal. 341; *Allison v. Half-acre*, 11 Iowa, 450; *Campbell v. Wortman*, 58 Mo. 258; *Gaston v. Stott*, 5 Or. 48; *Keller v. Brickey*, 78 Ill. 133. The foregoing were cases of grants to railroad companies, but, as remarked by Field, J., in *Missouri etc. Ry. Co v. Kansas etc. Ry. Co.*, 97 U. S. 497, the principles therein enunciated are applicable to all similar congressional grants. Nor is there any thing in the policy of the federal government with respect to the public lands which would call for any qualification of the terms of

the grant. The public lands would not be made any less valuable for settlement by a law of Congress authorizing the locating of highways on the public domain; but, on the contrary, their value would be enhanced. Such roads facilitate the settlement of the country, and benefit neighborhoods, and in both particulars further the general policy of the government.

But we are met by the contention of respondent that the act of Congress dedicating the right of way across the public land is not an absolute grant, but is in the nature of a general order to the public, which takes effect and only becomes operative as a grant when its terms are accepted. This proposition, without doubt, rests on the elementary principle that a grant, like any other contract, must have two parties—a ¹⁰ grantor and a grantee—and an offer not accepted constitutes no contract. The parties to a dedication are the owners and the public; and it must be remembered that the public is an ever-existing grantee, capable of taking dedications for public uses, and its interests are a sufficient consideration to support them. It may be unnecessary to cite authorities upon this generally conceded rule, but we will take the liberty of doing so, even at the risk of being prolix: *Warren v. Town of Jacksonville*, 15 Ill. 240; *Cincinnati v. White*, 6 Pet. 431; *Maywood County v. Village of Maywood*, 118 Ill. 61. It may, however, be admitted that the right acquired by the territory or the public was necessarily imperfect until the land accepted for highways was surveyed, and capable of identification; but when the land was surveyed, and the various section lines were designated to be public highways as far as practicable, the right of the territory attached to them for that purpose, and took effect as of the date of the territorial law: *Wisconsin etc. R. R. Co. v. Price County*, 133 U. S. 496. The act of Congress giving the right of way for the construction of highways over public lands, and the territorial law declaring all such lines, as far as practicable, to be public highways, and designating such highways to be sixty-six feet wide, are notice to all persons filing on public lands, subsequent to the passage of these laws, that they take them subject to the right of way for highway purposes, if such section lines are found to be practicable for that purpose. In the case before us we are not called upon to construe the limitation, exception, or effect of the words "if practicable," to be found in the territorial enactment, because

the record shows that upon the trial of the action it was expressly stipulated as a part of the facts upon which the case should be heard that this particular strip of land was on or about the twenty-first day of April, 1885, duly opened by the proper authority as a public highway, and that ever since that time it has been so used and traveled upon as a public highway by the general public, thus establishing by express stipulation of the parties that it is and was practicable as such highway. The respondent further contends that the territorial legislative act ¹¹ cannot be considered as an acceptance of the congressional grant, because the territory of Dakota was not clothed with authority to construct highways, and that a legislative enactment cannot amount to the construction of a road or highway. The congressional act does not imply in its grant that the grantee shall be constructor of the highway. It grants the right of way only. It does not say how or by whom they may be constructed. The right to construct highways over the public land is what is given and granted, and that right is not restricted by the manner or mode of construction. The territorial law located the highways upon all public lands upon the section lines, and this public grant or dedication was so accepted, and became valid as against the government, and therefore valid as against its subsequent grantee, who must take the land subject to this right. The title to the land is not taken away. It is merely the right to pass over and use it for roads and highways when found practicable. If not so found by competent authority, the grantee of the government holds the lands divested of this right.

It is further contended that when private property is taken for public use, just compensation must be made to the owner. This proposition is undoubtedly true. But at the time of the location of the highway in question, was the land over which it was located the property of the respondent? We think not. The act of Congress granting the right of way over public lands for highways was passed in 1866. The code of 1877, containing the section line statute, was passed at the session of the legislature beginning January 9, 1877, and closing February 17, 1877. The Indian title to the Black Hills country, in which the land in question is situated, was relinquished to the United States on February 28, 1877. The lands were first surveyed in July or August, 1879, and the official plats were filed in the United States land-office at Deadwood,

Dakota, February 18, 1880. The respondent settled on said tracts of land on the eighteenth day of January, 1879, and made final proof of his right thereto on June 16, 1883, under the pre-emption laws of the United States. These facts in relation to survey, settlement, and final ¹² proof were stipulated as being true, and, for the purposes of this case, we take them as being such without an examination of records or other authorities. The question rises, when did the respondent acquire an absolute title to the land in question, previous to its being declared to be a highway? His settlement was made January 18, 1879. Settlement on the public lands of the United States confers no rights as against the government or its grantees. The settler acquires no vested interest in the land until he has entered the same at the proper land-office, and obtained a certificate of entry. Until then, the land continues subject to the absolute disposing power of Congress. In the case of *Campbell v. Wade*, 132 U. S. 35, one of the latest decided by the supreme court of the United States involving this principle, Justice Field says: "It has always been held that occupation and improvement of the tracts desired, with a view to pre-emption, though absolutely essential for that purpose, do not confer upon the settler any right in the land occupied, as against the United States, which could impair in any respect the power of Congress to withdraw the land from sale for the uses of the government, or to dispose of the same to other parties." This subject was fully considered in *Frisbie v. Whitney*, 9 Wall. 187, where the same doctrine was announced. It was subsequently affirmed in the *Yosemite Valley Case*, 15 Wall. 77, where the court said that until all the preliminary steps scribed by law for the acquisition of the property were complied with, the settler did not obtain any title against the United States, and that among these were entry of the land at the appropriate land-office, and payment of its price." "Until such entry and payment," the court said, "the acts of Congress give to the settler only a privilege of pre-emption in case the lands are offered for sale in the usual manner; that is, the privilege to purchase them, in that event, in preference to others. The United States, by these acts, enter into no contract with the settler, and incur no obligation to any one that the land occupied by him shall ever be put up for sale. They simply declare that in case any of these lands are thrown open for sale, the priv-

ilege to purchase them in limited quantities, at fixed prices, ¹³ shall be first given to parties who have settled upon and improved them." Neither the stipulation of facts nor the evidence introduced at the trial show when respondent entered the land in question or filed his declaratory statement. It is presumed, however, the entry must have been made within thirty months before the final proof, as section 2267 of the Revised Statutes of the United States requires that "all claimants of pre-emption rights . . . shall, when no shorter time is prescribed by law, make the proper proof and payment for the lands claimed within thirty months" after filing the declaratory statement. The final proof was made June 16, 1883. Thirty months previous would be December 16, 1880, which date was the earliest period of time, under the decisions above cited, that the respondent had any substantial claims to the land; but not until he had made final proof was any title vested in him. The lands became a part of the public domain of the United States February 28, 1877. They were surveyed, and the official plat was filed in the proper United States land-office, in February, 1880. This survey designated the proper section lines. The law of Congress giving the right of way for highway purposes over these lands was in force, and operated on them. The territorial law of 1877 of Dakota, making all section lines highways, dedicated thirty-three feet on each side of these lines to the public for that purpose. Respondent's entry and proof being subsequent to these, whatever vested right he afterwards acquired must be subject to these limitations. It is unnecessary to consider the question raised by the appellant by reason of the premises having been conveyed to one George Hunt by the respondent, or the errors of the court below, if there were any, as to the admission or rejection of evidence in relation to special damages, as the views above expressed are decisive of the case, as far as the right of recovery exists on the part of the respondent; for the allegations stated in the complaint, taken in connection with the stipulation of facts, do not show that the respondent is entitled to recover. The cause is reversed and remanded.

All the judges concurred.

GRANTS OF PUBLIC LANDS—INTERPRETATION.—A grant of public land takes effect from its date and not from the time of its delivery: *Ex parte Kuhlman*, 3 R ch. Eq. 257; 55 Am. Dec. 642. Where land is conveyed to a state by act of Congress, title thereto vests in the state from the date of the

act, and the patent which afterwards issued for such land is only evidence of the grant and not of the date on which the grant took effect: *Sterling v. Jackson*, 69 Mich. 488; 13 Am. St. Rep. 405. The confirmation of a Spanish title relates back to the original grant: *Stark v. Mather, Walker*, 181; 12 Am. Dec. 553, and note at page 568, to the effect that a patent relates back to the date of the first act. See, also, the note to *Terry v. Megerle*, 85 Am. Dec. 93.

PUBLIC LANDS—RIGHTS OF SETTLERS.—A mere possessor of public lands, with hope of future entry by pre-emption, is not a possessor in good faith: *Gibson v. Hutchins*, 12 La. Ann. 545; 68 Am. Dec. 772, and note. A right of pre-emption gives no title to the land prior to the exhibition of the necessary proofs, and the adjudication of the land by the register to the person claiming the right: *Henry v. Welch*, 4 La. 547; 23 Am. Dec. 490, and note. A mere possessor of public land, who has planted a crop thereon, cannot maintain trespass against a purchaser who enters and removes the crop: *Floyd v. Ricks*, 14 Ark. 286; 58 Am. Dec. 374. But compare *O'Hanlon v. Denvir*, 81 Cal. 60; 15 Am. St. Rep. 19, and note. Until a patent issues, the rule of *caveat emptor* applies with peculiar force to purchasers of land from pre-emption entrymen: *Jones v. Meyers*, 2 Idaho, 793; 35 Am. St. Rep. 259, and note. See, further, on this subject the extended notes to *Tyler v. Green*, 87 Am. Dec. 132, and *Henry v. Welch*, 23 Am. Dec. 492.

WILLIAMS v. WAIT.

[2 SOUTH DAKOTA, 210.]

APPELLATE PROCEDURE.—A JUDGMENT IS FINAL so as to permit an appeal therefrom, though the costs have not been taxed or allowed. The taxation of costs may take place after the entry of a judgment, and therefore the fact that they have not been taxed does not prove that no final judgment has been entered.

LANDLORD AND TENANT—EVIDENCE.—FOR THE PURPOSE OF PROVING the landlord's title in an action between him and his tenant, a lease from the former to the latter is competent and sufficient evidence.

LANDLORD AND TENANT—ESTOPPEL.—A TENANT CANNOT DISPUTE THE LANDLORD'S TITLE in an action to recover possession of the leased premises, though he did not receive such possession from his landlord, by evidence tending to prove that while he was himself the owner and in possession of the property, he and his wife were by fraud and duress induced to execute a conveyance thereof to the plaintiff, after which he accepted a lease from the plaintiff.

LANDLORD AND TENANT.—A TENANT IS ESTOPPED FROM CONTROVERTING HIS LANDLORD'S TITLE WHILE REMAINING IN POSSESSION of the leased premises, though he receives such possession from the landlord, unless he can prove that the lease was obtained by fraud, misrepresentation, or mistake, and the fact that the tenant had before the lease a better title than his landlord does not create a presumption of such fraud, or that the lease was accepted by mistake.

Joe Kirby, for the appellant.

C. B. Kennedy, for the appellee.

212 KELLAM, P. J. This is an action in forcible entry and detainer, certified from the justice court on account of the question of title, and tried in the circuit court for Lincoln county. Plaintiff's complaint stated the following facts: That on the eighteenth day of April, 1888, he leased in writing to defendant certain premises in said county of which he was the owner and entitled to the possession, for the term commencing on said eighteenth day of April, and ending on the first day of November, 1888; that defendant went into possession under said lease, but refused to vacate or deliver possession to plaintiff upon the expiration of his said term, and after due and timely notice to quit was properly served. The lease referred to was set out and made a part of the complaint. The answer of defendant denied generally, except that it admitted the execution and delivery of the lease, but alleged that the defendant was then, and during all the times mentioned in the complaint, the absolute owner in fee, and entitled to the possession as such owner of the premises described in the complaint; that said premises were the homestead of himself and wife, and were, during all of said time, so occupied by them; that said lease was obtained from him wholly without consideration, and that he was induced and compelled by plaintiff to sign the same by means of fraud, menace, and mistake; **213** that plaintiff represented to defendant that he was the owner of said premises, and that his title was paramount to that of defendant, when in fact he had no title; that plaintiff threatened to commit unlawful and violent injury to the property of said defendant if he failed to sign said lease; and, further, that plaintiff did, by means of fraud and duress, induce defendant and his wife to sign a warranty deed of said premises to him, which deed was never delivered nor further executed than merely to be signed; that but for the mistake of the defendant as to the legal effect of said deed, and but for said fraud, menace, and mistake, he would not have signed said lease. At the close of the testimony the court directed a verdict for plaintiff. A motion for a new trial was overruled, and judgment entered upon the verdict. The judgment is set out at length in the abstract, and concludes as follows: "And that he [plaintiff] have judgment for the costs and disbursements, taxed and allowed at — dollars." Defendant appeals from the judgment and the order overruling his motion for a new trial.

Respondent moves to dismiss the appeal on the ground that the judgment below was not in condition to be appealed from when the notice of appeal was served, in that "the costs were not taxed and allowed and entered in the judgment, and the judgment was not complete." The question presented by the motion is simple in itself, but its solution is not free from difficulty. Section 5214 of the Compiled Laws gives the right to appeal to any aggrieved party from "any judgment" of the circuit court. Section 5024 defines a "judgment" as "the final determination of the rights of the parties in the action." In this case it is not questioned, nor could it be upon the record, but there was a full consideration and determination of all the questions presented by the parties for litigation. The court rendered judgment upon the merits on all the issues in dispute. This by statute entitled the prevailing party to certain costs and disbursements, and in recognition thereof the judgment provides that the plaintiff (the successful party) "have judgment for the costs and disbursements, taxed and allowed at — dollars." Could the clerk properly enter the judgment in that form, or ²¹⁴ should he wait until the costs are taxed? By sections 5101 and 5102, the clerk is required to keep a "judgment book," and to enter the judgment therein, clearly specifying "the relief granted or other determination of the action." I do not find any statutory provision, as there is in some of the states, fixing any time for the entry of judgment. Section 5095 says, judgment "may be entered by the clerk upon the order of the court or the judge thereof." That the judgment may and will be actually entered by the clerk before the costs are taxed seems plainly within the contemplation of the statute. Section 5197 provides that "the clerk must insert in the entry of judgment on the application of the prevailing party, . . . the sum of the allowance of costs, as provided by this code." This language clearly indicates that the judgment has already been entered, and that the costs are subsequently inserted. The clerk is directed to insert the costs in the entry of judgment, not to adjust and insert the costs, and then enter the judgment. We think that the several provisions of the code upon the subject contemplate that the entry of the judgment by the clerk will be made prior to the adjustment of the costs: See *Gilmartin v. Smith*, 4 Sand. 684. Having entered the judgment, it then became the duty of the clerk, if not furnished by the party or his attorney, to make up and file a judgment-roll, and this

he shall do immediately after entering judgment: Comp. Laws, sec. 5103. From this event—the filing of the judgment-roll—commences to run the two years within which an appeal from the judgment may be taken: Comp. Laws, sec. 5216. Now, if we are correct in our conclusion that the entry of judgment by the clerk is to be made before the costs are taxed, and the judgment-roll filed immediately thereafter, as provided in said section 5103, and the contention of respondent is also correct, that the judgment cannot be appealed from until the costs are taxed and inserted in the judgment, then it would follow that an aggrieved party would not have the time assured him by the statute within which to appeal, but would be deprived of just so much of that time as intervened between the filing of the judgment-roll and the taxation of the costs; that is, instead of having two years ²¹⁵ within which to appeal, he would have only what was left of that time after the prevailing party had taxed his costs, for the appeal must be taken within two years “after the judgment shall be perfected by filing the judgment-roll.” We have no statute, as in Wisconsin, requiring taxation within a limited time, and no statutory method of compelling the prevailing party to proceed to such taxation. Nothing would be left to a party desiring to appeal, under such circumstances, but an application to the court to require the prevailing party to tax his costs. It is true the costs are to be taxed “as a part of the judgment,” but they are a distinct and separable part of it. “They are regulated by statute, and are an incident or appendage of the judgment,” says the court in *Scott v. Burton*, 6 Tex. 322; 55 Am. Dec. 782. If the judgment of the court gives costs to a party not entitled to them under the law, that is error in the judgment, and might be considered, if properly assigned, in an appeal from the judgment, for that is a part of what the court adjudicated, but the adjustment of the definite amount of the costs and disbursements is a matter first committed to the clerk. It is presumably only a matter of computation, and is ministerial. If either party is dissatisfied with the action of the clerk, he may appeal to the court or judge, but we do not understand that this must all precede the entry of the judgment by the clerk. Such a ruling would operate as a stay of proceedings against the prevailing party for an indefinite number of days, so far as making his judgment available to him as security for recovery, and as suggested in *Stimson v. Huggins*, 9 How.

Pr. 92, such enforced delay in entering and docketing a judgment would often entirely defeat the party recovering a verdict from collecting any portion of it. Ample time would thus be given to create liens and shifts of property by which the vigilant creditor might be entirely defeated in obtaining the fruit of his litigation.

It is distinctly recognized, both in Wisconsin and New York, where the rule contended for by respondent prevails, that, as matter of fact—and that, too, under the plain instruction of the statute—the costs are taxed after the entry of judgment: ²¹⁶ *Stimson v. Huggins*, 9 How. Pr. 88; *Cord v. Southwell*, 15 Wis. 216; and that such judgment docketed with costs untaxed is a lien upon real estate. Considering that the purpose of an appeal is to have reviewed the adjudication of the lower court upon the merits, from which the matter of costs is entirely separate, and that the object of making the judgment a lien upon real estate is to encumber the same to the amount of such judgment, there would seem to be at least as much reason for holding a judgment too incomplete to constitute a lien until the costs are taxed, and the full amount of the judgment and consequent lien definitely fixed, as for holding that such judgment is too incomplete to be appealed for the review of questions having no relation to the matter of costs. In *Richardson v. Rogers*, 37 Minn. 463, where the Wisconsin and New York rule is adopted by that court, it is said that, as respects the lien of a judgment, the omission to tax and include the costs before docketing is to be treated as an irregularity merely; but is it entirely fair to charge as an irregularity to be excused by the grace of the court, what is plainly and confessedly a literal compliance with the statute? There are undoubtedly, as remarked by the court in *Richardson v. Rogers*, 37 Minn. 463, two sides to the question raised by this motion; but influenced somewhat by the foregoing considerations, and possibly more by the desire to follow the precedents of the territorial supreme court, we hold to the rule that an appeal from a judgment will not be dismissed because taken before the costs are taxed and inserted in the entry of the judgment. We follow *Adams v. Smith*, and *Champion v. Board County Commrs.*, in which memorandum opinions simply were filed, which will appear in 6 Dakota, 94, and overrule the motion to dismiss the appeal.

Upon the trial of the case plaintiff offered the record of the final receipt of the receiver of the land-office to one Houks,

and of the deed from Houks to defendant. These were admitted over defendant's objection, and their admission is assigned as error. It was not necessary for plaintiff to introduce these evidences of his title, but there was no error of which defendant can complain in their admission. Until it was attacked, ²¹⁷ plaintiff's lease with defendant was all the evidence of his title or right of possession that he need to furnish; for, as between lessor and lessee, it proved the landlord's title and his right to possession upon expiration of its term. Besides, the defendant, equally with plaintiff, derived whatever rights he had to these premises from these instruments, and their admission at the instance of plaintiff could do him no possible harm. We do not, therefore, stop to inquire whether or not a proper foundation had been laid for their introduction.

Plaintiff then offered the record of a deed from defendant and his wife to plaintiff, he having testified that he received the deed and delivered it to his attorney, Mr. Kennedy, and Mr. Kennedy, having testified that he procured the deed to be recorded, received it again after its record, it being returned to him at his office; that he had made a careful search for it several times, and could not find it, and that it was lost. This was sufficient, under section 5308 of the Compiled Laws, to admit the record of the deed as evidence.

Upon his part, and as a defense to this action for possession, defendant offered to show by Lucy A. Waite, his wife, that she was induced to sign the deed from defendant and herself to plaintiff by a threat made by plaintiff that if she did not do so he would cause her husband to be arrested and placed in the penitentiary, and that she would not have signed said deed but for fear that he would carry out said threat. The offer was rejected by the court, defendant excepted, and alleges error thereon. There was no error in this ruling of the court. This was an action to recover possession of the premises described. By the lease defendant had recognized the plaintiff as his landlord, and had undertaken to vacate and surrender the premises to him at the expiration of his term. That the tenant cannot ordinarily dispute his landlord's title is too elementary a proposition to support by authorities. But this was a direct attempt in a collateral action to show that the landlord had no title, because he acquired it through fraud or menace. Defendant might have proved, if he could, that the lease itself was so procured, for that would have

destroyed its effect as a lease. We ²¹⁸ were at first, influenced perhaps by the apparent equities of the case, inclined to think that the defendant, not having obtained his possession from plaintiff or through the lease, would not be bound by the rule, and we should find some authority for such holding: See *Tewksbury v. Magraff*, 33 Cal. 237; *Franklin v. Merida*, 35 Cal. 558; 95 Am. Dec. 129; *Davison v. Ellmaker*, 84 Cal. 21; but the weight of authority is evidently against such view. Mr. Washburn, in his work on Real Property, fifth edition, page 600, says of it: "But this doctrine has been considerably limited in the court which declared it, and is not sustained by the general current of authority." In *Ward v. Philadelphia* (Pa., Oct. 4, 1886), 6 Atl. Rep. 263, plaintiff had been in possession from 1874 to 1881 under a deed to him. He then became a party to a lease with the city, agreeing to pay rent, supposing the city's title was better than his own. Afterwards he became satisfied that he had a better title than the city, and refused to pay rent. The city distrained. Upon the trial the dominant question was whether or not Ward was estopped from impeaching his landlord's title. The court held that, while the tenant might show that the lease was obtained through fraud, misrepresentation, or mistake, yet the mere fact that the tenant had a better title than his landlord did not raise a presumption that the lease was a fraud or accepted by mistake. The lease was held binding, and the tenant estopped. In *Thayer v. United Brethren Soc.*, 20 Pa. St. 60, the lessee was in possession when the lease was made, and the court says: "If the lessee was in possession at the time the lease was executed, he may, under certain circumstances, be permitted to prove that the land is his own, and thus resist the proceedings to turn him out. This is allowed, because the landlord, if he fails, is not in a worse condition than he was before the lease. In order, however, to give the tenant this right, it is necessary for him to prove that he accepted the lease in mistake, or that he was induced to accept of it by some fraud or misrepresentation. He will be able to avoid the lease by proof of such facts as would entitle him to relief in equity from any other obligation created by deed: See, also, *Parrott v. Hungenburger*, 9 Mont. 526; ²¹⁹ *Tyler v. Davis*, 61 Tex. 674; *Henderson v. Miller*, 53 Mich. 590; *Hawes v. Shaw*, 100 Mass. 187; *Prevot v. Lawrence*, 51 N. Y. 222. As before suggested, it would have been competent for defendant to show that he was induced to

make the lease through the fraud or misrepresentation of plaintiff, or under such circumstances as would justify its annulment in equity; for that would have canceled his relation with plaintiff as his tenant, and released him from its obligations; but the offer did not go to the execution of the lease, but to the execution of the deed which preceded it. The evidence, if admitted, would not affect the validity of the lease, but would simply tend to the impeachment of the landlord's title. If the facts, covered by the offer, had been fully proved, still the lease, afterwards deliberately made with knowledge of the facts—and there is nothing in the offer to negative such knowledge—would have been valid and binding, and until impeached would have constituted defendant the tenant of the plaintiff, and as such estopped him from denying his landlord's title. It would have been good evidence directed against the deed, but was not good as against the lease.

Defendant further offered to show by the same witness that a condition upon which said deed was signed by her was, that she, with defendant, her husband, should be allowed to occupy said premises one year free of rent. This offer was refused, and is made the basis of appellant's sixth assignment of error. This evidence would have been obnoxious to the same objection as that last considered. While leaving untouched the validity and force of the lease, it sought to undermine the landlord's title. This offer was properly rejected by the trial court.

Appellant's seventh assignment alleges error in rejecting his offer to show that he had a right, under the chattel mortgage referred to in his evidence, to sell the stock. Defendant had testified that he was induced to sign the deed to plaintiff by being accused by him of having unlawfully sold stock covered by this chattel mortgage, and by the threats of plaintiff, ²²⁰ that he would cause him to be arrested therefor and imprisoned. The testimony offered was incompetent, and properly rejected, for reasons already fully stated. The issue was not whether plaintiff had, in fact, a good title, but whether defendant had deliberately recognized his title as good, and, by accepting a lease from him and becoming his tenant, had estopped himself from disputing his title in this form of action. We think, under established rules of law, which we cannot bend to meet the apparent equities of individual cases, he had done so, and that in this action for possession

he could only question his landlord's title, after having impeached the lease itself, and thus canceled his obligation as a tenant under it. There being no error in the rulings of the trial court upon the admission and rejection of evidence, there was nothing in the case for the jury, and the court properly directed a verdict for the plaintiff. The judgment of the court below is affirmed.

All the judges concurring.

LANDLORD AND TENANT—LEASE AS EVIDENCE OF RELATION.—In an action upon a lease to recover rent, the plaintiff's allegation of possession is *prima facie* established by the introduction of the lease: *Collins v. Hall*, 5 Wash. 366. The relation of landlord and tenant is not proved by the mere production of the lease in evidence, but the entry of the lessee under the lease, or a holding by him referable to the lease, must also be proven: *Caldwell v. Center*, 30 Cal. 539; 89 Am. Dec. 131.

LANDLORD AND TENANT—ESTOPPEL OF TENANT TO DENY LANDLORD'S TITLE.—A tenant cannot be heard to dispute the title of his landlord during the existence of the tenancy: *Whaley v. Whaley*, 1 Spear, 225; 40 Am. Dec. 594, and note; *Springs v. Schenck*, 99 N. C. 551; 6 Am. St. Rep. 552, and note; *Young v. Smith*, 28 Mo. 65; 75 Am. Dec. 109, and note; *Winston v. President etc.*, 28 Miss. 118; 61 Am. Dec. 540, and note; *Vrooman v. McKaig*, 4 Md. 450; 59 Am. Dec. 85, and note; *Emerick v. Tavenner*, 9 Gratt. 220; 58 Am. Dec. 217, and note; *Givens v. Mullinax*, 4 Rich. 590; 55 Am. Dec. 706, and note; *Voss v. King*, 33 W. Va. 236; *Casey v. Hanrick*, 69 Tex. 44; *Derrick v. Luddy*, 64 Vt. 462; *Heisen v. Heisen*, 145 Ill. 658; *McKissick v. Ashby*, 98 Cal. 422; *Robinson v. Holt*, 90 Ala. 115; *Nicrosi v. Phillipi*, 91 Ala. 299. See the extended note to *Camp v. Camp*, 13 Am. Dec. 68, and the notes to the following cases: *Franklin v. Merida*, 95 Am. Dec. 139; *Bailey v. Kilburn*, 43 Am. Dec. 425; and *Camley v. Stanfield*, 60 Am. Dec. 222.

BAKER v. BAKER.

[2 SOUTH DAKOTA, 261.]

STATUTE OF FRAUDS.—AN AGREEMENT TO EXECUTE A MORTGAGE upon real property may be enforced in equity if the complainant has performed his part of the agreement by furnishing the money for which such mortgage was agreed to be given.

SUBROGATION AND EQUITABLE ASSIGNMENT.—If money is loaned to a husband and wife under an agreement that it is to be used to discharge a mortgage existing against her real property, and that a mortgage is to be given to the lender for the amount so loaned, and the money is afterwards advanced as agreed, and is applied to the satisfaction of the mortgage, after which the borrowers refuse to execute a mortgage to the lender, he is an equitable assignee of the mortgage so satisfied, and entitled to be subrogated to the lien thereof.

PAYMENT, WHAT IS NOT.—THE GIVING OF A NOTE AND A CHATTEL MORTGAGE by a debtor to his creditor will not be presumed to be in payment

of a pre-existing debt to the extent of the note and mortgage, and though they are assigned as collateral, and are foreclosed by such assignee, there is no presumption that the mortgagor is entitled to be credited the amount of his note or any other sum in the absence of all evidence as to the amount realized on the foreclosure, and as to the value of the property mortgaged.

Davis, Lyon and Gates, for the appellants.

Joe Kirby, for the respondent.

263 KELLAM, P. J. This is an equitable action, in which plaintiff alleges that on or about the thirty-first day of December, 1887, at the solicitation of defendants, who are husband and wife, she advanced to them the sum of \$550 to pay off a mortgage of that amount on certain lands, the title to which was in defendant Annie Baker; that defendants agreed that upon receipt of said money and payment of said mortgage they would immediately execute to plaintiff a mortgage therefor upon the same land, to become due January 1, 1889, with interest at 7 per cent; that said money was so loaned and advanced in pursuance of such agreement, and that the same was used in paying off said mortgage, but that defendants immediately after did, and ever since have refused to make such promised mortgage; that defendants are insolvent, and that no part of said \$550 has been paid, except the sum of \$20. Defendants, answering, allege that the premises described were the sole and separate property of defendant Annie Baker, wife of defendant George Baker; that defendant George Baker borrowed of plaintiff the sum of \$445 for the purpose set out in the complaint; that the same was so used, and that it constituted the loan referred to in the complaint. The answer denies all other allegations of the complaint, and alleges, further, that on the sixth day of January, 1888, a note and chattel mortgage for \$300 of said money was given to plaintiff, which note and mortgage were afterwards sold and transferred to Sioux Falls Savings Bank, and the proceeds applied upon said note, and that the balance of said \$545, to wit, \$245, was fully paid to plaintiff before the commencement of this action. Upon the trial the court submitted certain questions of fact to a jury. The questions and the answers returned are as follows: "Q. To whom did plaintiff lend the \$550, to George A. Baker individually, or to both George A. Baker and Annie Baker? A. To both. Q. Was there any agreement on the part of both defendants to secure the plaintiff by real estate mortgage on the **264** southwest

quarter of section 33, township 101, range 49, Minnehaha county? A. Yes. Q. Has the whole amount of indebtedness been canceled by payment? A. No." The court also found as facts that defendants are husband and wife; that Annie Baker was the owner of the land described; that on the thirty-first day of December, 1887, there was due upon a mortgage to one Fairfax on said premises, \$550; that on or about that day plaintiff and defendant entered into an agreement that plaintiff would lend defendants the sum of \$550, for the purpose of paying off said mortgage; that defendants would repay the same January 1, 1889, with 7 per cent interest, and that to secure the same they would make and deliver to plaintiff a mortgage upon said premises, and that plaintiff should have a lien upon such premises to secure said loan, and that on said thirty-first day of December plaintiff paid over to said defendants the said sum of \$550, and fully performed her part of said agreement; that said money was then and there used to pay off said first-mentioned mortgage, and that plaintiff immediately demanded of defendant that they make and deliver the promised mortgage to her, which they did then, and still do, refuse; that defendant George Baker afterwards gave plaintiff his note for \$300, secured by a chattel mortgage on a team of horses; that plaintiff did not take said note and chattel mortgage as payment upon said indebtedness, but as security therefor; that the chattel mortgage was afterwards foreclosed, and there was realized thereby the sum of \$30 over and above the costs of foreclosure; and that, except said \$30, no part of said \$550 has been paid. As conclusions of law, the court found that there was due plaintiff from defendants the sum of \$610, and that plaintiff was entitled to have said sum declared a lien and mortgage upon said premises, and judgment was so entered, from which defendants appeal.

After carefully examining the testimony, we do not think we are required to discuss at any length appellants' objections to the answers of the jury or the findings of the court upon questions of fact. The existence of the original mortgage of \$550, and its discharge by the funds procured from plaintiff, ²⁶⁵ were undisputed; but as to nearly all the other facts involved—who borrowed the money; how it was to be paid or secured, if at all; and how much, if any, had been paid—the witnesses were in positive disagreement, and the evidence in irreconcilable conflict.

As to who borrowed the money, plaintiff testified: "In the latter part of December, 1887, my sister-in-law [defendant Annie Baker] asked me if I would loan them money to pay a mortgage on their farm, and they would give me good security. The mortgage was to be paid the 1st of January, and they would pay it, and give me a mortgage on the farm." "Annie Baker first asked me for the loan. Had a conversation with George Baker afterwards. I loaned the money to both of them." Afterwards, referring to the conversation with defendant George Baker about January 1st, she says: "He said the mortgage is due on my farm. I will pay that to Fairfax, and will give you good security on the farm as soon as I pay that up." She also testified to substantially a repetition of this agreement on the following day at Mrs. Bell's, when both defendants were present, and her testimony as to the last conversation is, at least, partially corroborated by Mrs. Bell. To be sure, plaintiff's testimony in this respect, as in others, is flatly denied by the defendants; but this does not necessarily destroy, or even diminish, its probative force. The conflict is positive and substantial, and the finding of the court and jury upon these disputed facts must be accepted as conclusive upon this court. The practice is too well settled to admit of a departure from it in this case. We think the same remarks are fully applicable to all other conclusions of the court or jury upon questions of fact, with possibly one or two exceptions, which will be noticed.

Appellants except to the finding of the court that there was an agreement on the part of defendants to secure the plaintiff by mortgage upon the real estate, because there was no written evidence of such agreement, and cite section 3617 of the Compiled Laws, which reads as follows: "No agreement for the sale of real property, or of any interest therein, is valid unless the same, or some note or memorandum thereof, be in writing, and ²⁶⁶ subscribed by the party to be charged, or his agent thereunto authorized in writing; but this does not abridge the power of any court to compel the specific performance of any agreement for the sale of real property in case of part performance thereof." And section 4346 of the Compiled Laws as follows: "A mortgage of real property can be created, renewed, or extended only by writing executed with the formalities required in the case of a grant of real property." Without stopping to discuss the applicability of either of these sections to the question presented in this

case, it is sufficient to say that the power of a court of equity to decree the specific performance of a parol agreement to mortgage real property is well established, and has been often exercised under statutes like ours. *Dean v. Anderson*, 34 N. J. Eq. 496, was a suit in equity to compel the specific performance of a parol agreement to mortgage real estate, and in its opinion the court says: "Where an agreement has been executed, or in part performed, by the complainant, and the acts done place him in a position which is a fraud upon him unless the agreement is executed, equity will not permit the defendant to protect himself from executing his part of the agreement by pleading that it was not in writing. The ground upon which this court acts in cases of part performance is fraud in refusing to perform after performance by the other party, and the court will interpose and grant relief, notwithstanding the statute, when the complainant shows a performance on his side by which he would suffer an injury amounting to fraud by the refusal to execute the agreement on the part of the defendant": *Irvine v. Armstrong*, 31 Minn. 216; *De Pierres v. Thorn*, 4 Bosw. 266; *Ogden v. Ogden*, 4 Ohio St. 182.

But the appellants insist that the agreement was not sufficiently definite to entitle it to specific enforcement, in that no time was fixed when the mortgage should become due and payable. While it is alleged in the complaint, and found as a fact by the court, that the promised mortgage was to become due January 1, 1889, no evidence of that fact appears in the printed abstract; but, accepting as established the facts found, ²⁶⁷ except as to time of payment, the plaintiff would still be entitled to be held and regarded by the court as the equitable assignee of the Fairfax mortgage, which her money had so taken up. The doctrine of equitable assignment is often extended to a person, who, having no previous interest in the premises, and being under no obligation or personal necessity of paying the debt, pays off the mortgage, or advances the money for its payment at the instance of the debtor party and for his benefit. Upon the facts in this case it cannot be held that plaintiff was a stranger or volunteer in the payment of the Fairfax mortgage. The advance or payment was at the solicitation of defendants, and for their benefit. It was directly induced by the promise of a mortgage, and when defendants refused to give it, they imposed upon the court the plain duty of protecting plaintiff against loss from such refusal; and, upon the proofs presented by the

printed abstract, the court rightly did this in regarding plaintiff as an equitable assignee of the Fairfax mortgage, and decreeing that the amount so paid for its discharge, or so much of it as remained unpaid, should be a lien in favor of plaintiff upon the premises described: *Crippen v. Chappel*, 35 Kan. 495; 57 Am. Rep. 187; *Levy v. Martin*, 48 Wis. 198; *White v. Newhall*, 68 Mich. 641; *Wilton v. Mayberry*, 75 Wis. 191; 17 Am. St. Rep. 193.

The only other question which seems to us to require consideration grows out of the \$300 note and chattel mortgage given by defendant George Baker to plaintiff, and its subsequent foreclosure by the Sioux Falls Savings Bank. The answer substantially, though not specifically, alleges that this was given in partial payment of the \$550 advanced by plaintiff. In the entire absence of evidence, as in this case, the presumption is the other way, that it was not accepted as payment: *Hutchinson v. Swartsweller*, 31 N. J. Eq. 205; *Aultman v. Jett*, 42 Wis. 488; *Geib v. Reynolds*, 35 Minn. 331. And so the court finds, and we assume the fact to be, that plaintiff took it as collateral security to the original indebtedness of \$550. The court further finds, and there is evidence to support ²⁶⁸ the finding, that plaintiff afterwards used this note and chattel mortgage as collateral to an indebtedness of her own with the Sioux Falls Savings Bank, and it is undisputed that the bank afterwards foreclosed the same. Plaintiff did no legal wrong in so using the note and chattel mortgage that would make her chargeable in this action with its apparent value. At all events, defendant Baker could not complain until he should pay or offer to pay his note. The court finds that upon such foreclosure and sale the sum of \$30 was realized beyond the costs, and gives defendants a credit for that amount. To sustain this finding there is no evidence in the abstract, and appellants claim error therefor, and in connection submit this proposition: "The fact of foreclosure appearing, the presumption is, unless otherwise shown, that the proceeds of the mortgaged property were applied in payment of the debt, and that they were sufficient to extinguish it." We are not referred to any supporting authorities. The evidence in this case not only fails to show what the mortgaged property sold for, but is equally silent as to any suggestion of its value. It only appears that the mortgage was upon a team of horses. We are inclined to think, however, that appellants cannot take advantage of the want of evidence

to sustain this finding. Defendants were certainly entitled to have credited whatever was realized on such sale, upon the theory that they had paid so much; but it was for them to show, if they claimed a credit therefor, how much the credit should be. It is no ground of complaint upon their part that the court has given them a credit of \$30 to which they have not affirmatively shown themselves entitled. Nor can we perceive any error in the exclusion of the judgment-roll in the replevin case of *Savings Bank v. Defendant George Baker*.

It is not apparent on the record, nor is it suggested in argument, in what particular this judgment-roll, even if competent evidence in this case, could have thrown any light upon the matters in controversy between the parties to this action. We discover no reason for reversing the judgment in this case, and it is affirmed.

All the judges concurred.

SUBROGATION TO LIEN OF MORTGAGE BY ONE WHO LOANS MONEY TO PAY IT OFF.—One who advances money with which to pay off a mortgage, in pursuance of an agreement that he should do so, and that the mortgage should be discharged of record, and a new one given him on the same property for the amount advanced, is entitled to be subrogated to the mortgage: *Wilton v. Mayberry*, 75 Wis. 191; 17 Am. St. Rep. 193, and note. When a debt secured by mortgage is paid by one under no obligation to pay it, he is subrogated to the rights of the mortgagee in the mortgaged property: *Fears v. Albee*, 69 Tex. 437; 5 Am. St. Rep. 78. One who lends money for the express purpose of discharging liens upon real property, and who discharges those liens at the request of the debtor, expecting that his securities will of record take the place of those which he has discharged, will be subrogated to the discharged liens: *Emmert v. Thompson*, 49 Minn. 386; 32 Am. St. Rep. 566, and note. See the note to *Johnson v. Barrett*, 10 Am. St. Rep. 87.

PAYMENT—TAKING CHECK AS.—A check on a bank is not payment unless by express contract it is so received: *Johnson-Brinkman etc. Co. v. Central Bank*, 116 Mo. 558; 38 Am. St. Rep. 615, and note; *Steinhart v. National Bank*, 94 Cal. 362; 28 Am. St. Rep. 132, and note; *National Bank v. Chicago etc. R. R. Co.*, 44 Minn. 224; 20 Am. St. Rep. 566, and note. See the extended note to *Hemphill v. Yerkes*, 19 Am. St. Rep. 609-612.

ARNESON v. SPAWN.

[2 SOUTH DAKOTA, 269.]

SURVEYS—LOCATION OF PUBLIC LANDS.—Testimony as to lines of trees set so as to correspond to the location of a corner, at a place where one of the parties to the suit claims such corner to be, and also to the building of a schoolhouse on a lot which ran down to such corner, is admissible as tending to show the understanding of different parties in the vicinity as to the location of the corner, and aiding the jury in solving the question whether a certain mound, pit, or stake testified to by a witness did or did not constitute a government corner.

APPELLATE PROCEDURE.—WHETHER A TRIAL COURT ERRED in excluding a certificate of a survey cannot be shown to an appellate court, unless the substance of the certificate is disclosed by the record. If it is not so disclosed, the presumption is that the trial court ruled correctly.

APPELLATE PROCEDURE.—A judgment will not be reversed for the refusal to instruct the jury on propositions of law not involved in the case upon the evidence before the court.

EVIDENCE—OFFICIAL SURVEYS.—Though the statute declares that the report of an official survey certified in a particular manner shall be presumptive evidence of the facts stated therein, yet if the report is not received in evidence, but the surveyor himself testifies as a witness to the fact of his survey, and what was disclosed thereby, the probative value of his testimony is not fixed by law, and it must, therefore, be submitted to the jury like any other evidence.

JURY TRIAL.—AN INSTRUCTION TO A JURY MAY PROPERLY BE REFUSED if based upon an assumption of fact, and applicable only upon the jury finding the fact in the manner assumed.

SURVEYS—PUBLIC LANDS.—If a survey of public lands has been made by the government, and a patent issued to land covered by it described with reference to such survey, and it appears that a corner was established by the government surveyors, it must be accepted as the true corner, without regard to whether or not it was located with mathematical exactness.

SURVEYS—PUBLIC LANDS.—A DEFINITELY ASCERTAINED MONUMENT fixed by government surveyors as a boundary or corner between sections of land must govern as against other surveys or evidence tending to prove that such monuments or corners should have been located elsewhere.

TRESPASS QUARE CLAUSUM FREGIT cannot be sustained by the owner of property, not in possession nor entitled to the possession thereof at the time of the alleged trespass.

A LANDLORD, WHILE HIS TENANT IS IN POSSESSION, MAY SUSTAIN AN ACTION IN CASE for injury to the freehold.

LANDLORD AND TENANT—ACTIONABLE INJURY TO THE REVERSION.—The constructing of a permanent fence across a part of his land, and thus including it within, and attaching it to, the defendant's farm, under a claim of ownership by the latter, is an injury to the freehold for which a landlord may maintain an action, though committed when the premises were in possession of a tenant under a lease.

LANDLORD AND TENANT.—AN INJURY TO THE REVERSION FOR WHICH A LANDLORD MAY RECOVER by action will be presumed from an act which, if persisted in, may ripen into an adverse right.

PLEADING.—AN INJURY TO THE LANDLORD'S REVERSION is disclosed by a pleading which avers acts done by the defendant constituting an injury to the freehold. There need not be any formal statement that the reversion was injured.

Davis, Lyon and Gates, for the appellants.

McMartin and Carland, for the respondent.

272 KELLAM, P. J. The answer denied, but on the trial it was conceded, that plaintiff was the owner in fee of the northwest quarter of section 32, township 101, range 47, situate in Minnehaha county. The facts alleged as plaintiff's cause of action are thus stated in the complaint: "The defendant forcibly and unlawfully broke and entered upon the plaintiff's said land, took down a fence standing upon said land, removing the same, and also then and there erected another fence on said land, thereby fencing in about twelve acres of said land, the property of plaintiff; and also then and there disturbed the plaintiff in the use and **273** occupation of said land, preventing her from enjoying the same, and from receiving the rents, uses, and profits thereof, as she otherwise would have done, to the damage of plaintiff," etc. Defendant's answer was a general denial. It was admitted at the trial that the defendant had, prior to the commencement of the action, fenced in about thirteen acres of land which he claimed belonged to him, a portion of the northeast quarter of section 31, township 101, range 47, for which, it was conceded, defendant held a patent. It will thus be seen that plaintiff and defendant, respectively, owned adjoining quarter sections of land, and the dispute between them was as to the true location of the corner which should be at once the northwest corner of plaintiff's land, and the northeast corner of defendant's land, for that would determine the boundary line between them.

Upon the trial George Arneson testified that in June, 1884, he found the corner referred to, and particularly described how it was marked by mounds, pits, and stake, and the condition it was in; that he lived in that vicinity from 1873 until 1882 or 1883, and saw the corner "a good many times"; that he knew the location of the traveled road between the two quarter sections involved, and the east and west road on the north side of them; that these roads had been traveled since 1874; and that at the time of the trial they crossed or intersected each other, just where they did when he first saw them;

and that he recollected when the schoolhouse was built, and when other improvements were made about that corner. He then testified that lines of trees were planted along the east and west road, and the north and south road, in 1875, and were still standing; these lines of trees were on both sides of each road, about four rods apart; and that these lines of trees, so set, would correspond with the location of the corner, at the place where he had found it, as testified to and described by him; and that the line of trees running north and south opposite plaintiff's quarter (which would be defendant's quarter) were set by defendant, Spawn, in 1875. He also testified that the schoolhouse was built on the southeast corner of section 30, on a one-acre ²⁷⁴ lot, which "runs down to the corner," and that the corner was visible when the grounds were laid out and the schoolhouse built. (The southeast corner of section 30 would necessarily be the northeast of 31, and the northwest of 32, being the corner in controversy.) This evidence as to the location of the lines of trees and the schoolhouse was received over defendant's objection that the same was incompetent and immaterial, and as calling for the opinion of the witness as to what other parties did.

This evidence may not have been of great value, and its force may have been afterwards modified by defendant's (Spawn's) testimony that he set his trees hurriedly, and without reference to the corner; but they were circumstances which, unexplained, tended to show the understanding of different parties in that vicinity as to the location of the corner. These were improvements of a permanent character, made by parties who would naturally be interested in locating them correctly; and, being located with reference to a visible mound, the fact would tend very directly to show whether they then regarded such mound as the mark of the government corner. It must be remembered that in this case the first search must be for the corner established by the government survey, for that is conclusive, if found; and at this point the primary inquiry was, did the mound, pit, and stake testified to by the witness indicate such corner? The witness says these marks were plainly visible when these improvements were located. We think the fact that defendant, Spawn, and others, made and located these improvements with reference to these visible marks was fair evidence to go to the jury as to the impression which these marks made upon these various persons as they then observed them, and not as they now remember

them. Of course, no boundary rights would be concluded by such facts, but we think they were circumstances which the jury might properly know, and which might fairly help them in solving the question whether the mounds, pits, and stake testified to by the witness did or did not constitute the government corner. It was, perhaps, somewhat of the nature of traditionary evidence, often resorted ²⁷⁵ to in the effort to establish ancient and obliterated landmarks, and in this case tended, at least, to show that many years before, when these marks were more distinct and intelligible, they were recognized by the people living there, including the parties to the present controversy, as indicating the corner established by the government: *Baker v. McArthur*, 54 Mich. 139; *Coy v. Miller*, 31 Neb. 348.

Cyrus Walts testified that he was formerly a surveyor, and had been locating government land nineteen years; that in June, 1873, he ran the lines of section 29, and found the government corner of sections 29, 30, 31, and 32; that with reference to the roads the corner was right where they crossed each other; and his evidence as to the location of this corner, and the presence and appearance of the monuments indicating the same, tended to corroborate the testimony of the witness Arneson. The abstract says several other witnesses, without naming them, "testified, in relation to the corner claimed by the plaintiff, the same, in substance," as Arneson and Walts. It appearing from evidence introduced by plaintiff that he had leased the said northwest quarter of section 32 for a definite term, and at the time of the alleged wrongful acts the tenant in said lease was, and still is, entitled to, and was and is in the actual possession of, said premises, defendant moved to strike out all the evidence introduced by plaintiff, and to render judgment in favor of defendant, for the reason that the premises upon which the trespass is alleged to have been committed were then, and still are, in possession of a tenant under a lease. The refusal of this motion by the court is assigned as error, and will be considered later in this opinion.

The defendant introduced as a witness D. C. Rice, who testified that in November, 1888, he was county surveyor of Minnehaha county, and made the survey of said sections 29, 30, 32, and 31, at the request of several parties, naming them, and then offered in evidence "a certified copy of the report of D. C. Rice, county surveyor," which was objected to by

plaintiff as incompetent, immaterial, and irrelevant, and not properly certified ²⁷⁶ to." This objection was sustained, and defendant excepted. The paper thus offered in evidence is not given to us in the record, nor have we any means of knowing its contents. We do not know the substance or form of the certificate, nor how it was executed. Until error is affirmatively shown, the presumption is in favor of the ruling of the court. "As the assignments of error cannot be considered without having before us the contents of the instruments so received, or so offered and rejected, and they are not here, there is nothing to sustain such assignments of error, and the presumption in favor of regularity must prevail": *Blake v. Lee*, 38 Minn. 478.

The same disposition must be made of the error assigned upon the refusal of the trial court to admit a book called "Field Notes," and presented by defendant. One of plaintiff's objections to their admissibility was that they were not properly certified to. Defendant then introduced "certificate authenticating these records," thus presenting the question of the sufficiency of the certificate. There is nothing in the abstract to inform this court of the contents of such certificate, nor by whom or how it was executed. A knowledge of these facts is indispensable in passing upon the question of its sufficiency. Under these circumstances it is not possible for this court to say whether these records were so authenticated as to entitle them to be admitted or not: *Emerick v. Sloan*, 18 Iowa, 139; *Craft v. Dalles City*, 21 Or. 53. We think, under our practice, the rule should be that records, documents, or other writings, an understanding of which is essential to the appellate court in coming to a decision on the errors alleged, should be printed in the abstract, or their contents, or the facts upon which their competency depends, so particularly described as to give this court all the information which the trial court had; for only then can this court safely or properly express an opinion as to whether the trial court had erred or not. As announced by this court in *Noyes v. Lane*, 2 S. Dak. 55, the printed abstract, as agreed to by the parties or settled by the court in case of dispute, constitutes the record upon which a case is heard in this court; and appealing parties should see ²⁷⁷ to it that it contains every thing necessary for the appellate court to know or consider in investigating and passing upon every question sought to be reviewed.

The report of Surveyor Rice having been excluded by the court, he (Rice) testified as "a witness for defendant," as to how he made the survey, who assisted him, what rules he followed as to courses and measurements, and where—not being able to find the government corner—he established the corner in dispute. At the close of the evidence defendant asked the court to instruct the jury "that the survey of the county surveyor is presumptively correct," and the refusal of the court to give this instruction is assigned as error. This proposition is, without question, the general law of the state, for it is made so by statute: Comp. Laws, sec. 689. Whether the refusal of the court to give it to the jury as the law of this case was error or not depends upon whether there was any evidence in the case to which it could apply. It is not error for the trial court to withhold from the jury confessedly good law, where the same is outside of, and not involved in, the determination of the questions before it on the evidence in the case. The statute (sec. 689 et seq.) prescribes with much detail under what circumstances and how the county surveyors shall make an official survey, what his report of such survey shall contain, and what shall be done with it after it is so made, "and said record shall be competent evidence in all courts of the facts therein stated": Sec. 690. When section 689 says, "and his surveys shall be held as presumptively correct," we think it means his surveys made, authenticated, and proved as provided by the statute. When Rice testified as "a witness for defendant," his evidence did not take the place of his official report, nor did it carry the same presumption. It was simply the evidence of a witness. Its probative value was not fixed by the law, as in the case of his official return, but went to the jury like any other evidence. Suppose, instead of Rice, Van Antwerp, his assistant, or even one of the chainmen, had testified to precisely the same facts, could it be held that the official survey was so proved as to entitle it to the favorable presumption ²⁷⁸ of the statute? We think such a conclusion would be unsafe, and not within the contemplation of the law. The official report of the county surveyor not being in evidence, nor his survey proved in the manner provided by statute, we do not think defendant was in position to claim the benefit of the instruction asked for, and there was no error in the refusal of the court to give it: *Beeman v. Black*, 49 Mich. 598. Tested by the same rule, instructions marked "2" and "3" were prop-

erly refused. If given they could not have helped the jury, for they would have found no evidence in the case to which such instructions could apply.

Error is also assigned on the refusal of the court to give instructions 4, 5, and 6, as follows: 4. Recognized government corners, standing in the same township, should be considered, and section lines tested by both east and west distances and north and south distances, as given by the field notes of the government surveyor; 5. The general rule, that known monuments are to govern, is subject to exceptions, as where an adherence to the rule would be plainly absurd to its results; 6. The rule that, in the construction of a deed, courses, distances, and quantities must yield to natural or artificial monuments called for by the grant, is not inflexible. It applies with less force to artificial than to natural monuments, and, where there is any thing in the description showing that the courses and distances are right, they will prevail." We presume these instructions express correct rules of law for locating or establishing confessedly lost corners and boundary lines. In this case the primary issue was whether the government corner determining the boundary line between plaintiff and defendant was lost or not. The instruction as asked assumed the affirmative against the plaintiff. These instructions, admitting them to be good law in the abstract, could only have been properly given in this case upon the condition that the jury should first find that the original corner in question was lost, and this condition should have accompanied the instructions; for, as we will notice further on, if the corner established by the government surveyors, and in reference to which the patent was issued, is found and **279** definitely located, all inquiry as to its mathematical correctness is foreclosed; and so it was not error to refuse these instructions without the qualification suggested; for if the jury found with the plaintiff that the marks testified to by his witnesses were the marks of the government surveyor, and constituted the corner established by government survey, these instructions, however correct in a proper case, would have been inapplicable to this case.

We have read with considerable care the portions of the court's charge to which appellant excepts, and we discover no error. The charge was based upon the theory that there had been a survey of this land by the United States government, and that the patent to plaintiff was issued, and the

land covered by it described with reference to such survey; that, if the jury believed from the evidence that the mound testified to by plaintiff's witnesses was the corner established by the government surveyors, it constituted the true corner, and so far determined the boundary line of plaintiff's land, without regard to whether such corner was located with mathematical exactness or not. We think this was a correct statement of the law, and was applicable to the case before the jury. "There can be no doubt that the definitely ascertained monument fixed by the government surveyors as the boundary between sections must govern," says Dixon, C. J., in *Jones v. Kimble*, 19 Wis. 429. If the stakes or monuments placed by the government in making the survey to indicate the section corners and quarter posts can be found, or the place where they originally were placed can be identified, they are to control in all cases": *Hess v. Meyer*, 73 Mich. 259; *Britton v. Ferry*, 14 Mich. 53; *Knight v. Elliott*, 57 Mo. 317.

We now go back to consider defendant's motion to dismiss the complaint, for the reason that at the time of the wrongful acts complained of the plaintiff was not in possession nor entitled to the possession of the *locus in quo*. Admitting, as claimed by appellant, that the common-law rule is that actual or constructive possession is necessary to support an action of trespass *quare clausum*, and that the tenant for a definite term, ²⁸⁰ at least, being in actual possession, the landlord has not such constructive possession as will entitle him to maintain such action, it still remains to be considered whether this is distinctively and necessarily an action only in the nature of trespass *quare clausum*, and so controlled by the foregoing rule. The old action of trespass *quare clausum fregit*, as its name imports, was based upon an alleged invasion of possession, and in such action could be litigated only the injury to the possession, and damages recovered only by the party in or entitled to the possession; but there still remained to the landlord out of possession the right to sue for permanent injury to the freehold, in an action on the case. The interesting question presented by this record, therefore, is not whether plaintiff, being a landlord out of possession, could have maintained an action of trespass *quare clausum*, but whether, on the facts alleged and proved, he can maintain any action. The effect of the reformed practice is substantially to make all law actions at least actions on the case. The true rule would seem to be that, wherever a legal right

is violated, the owner of such right is the party entitled to action therefor. If possession only is disturbed, the owner of the right of possession may have his action for damages. If the freehold itself, independent of and beyond its present use and enjoyment by the tenant, is injured, the owner of the freehold ought in like manner to have his action. In his work on pleading, Chitty says: "Therefore, a landlord cannot, during a subsisting lease, support trespass, but the action must be in the name of the tenant, or the landlord must proceed in case." In his Commentaries (vol. 4, p. 119,) Chancellor Kent says: "There has been some difficulty in this country as to the right of a landlord to bring trespass for an injury to the land while there was a tenant lawfully in possession"; and, after referring to cases says: "The suit is in case for trespass to the injury of the reversion, unless the lessee in possession be at will only, and then trespass will lie by the reversioner." *Lienow v. Ritchie*, 8 Pick. 235, was an action on the case by the owner of a house for cutting away a part of it while it was in the occupation of his tenant for a definite term. The court ²⁸¹ says: "The facts found show a proper ground for an action on the case. The plaintiff not being in actual possession, nor having the right to possession against his lessee, could not maintain trespass. Case is the proper remedy for the landlord where an injury is done to the inheritance": See, also, *Starr v. Jackson*, 11 Mass. 519. *Lachman v. Deisch*, 71 Ill. 59, was an action "to recover damages for an injury to the plaintiff's real estate by the construction of a drain," the premises claimed to have been injured being in the actual possession of a tenant, and the court says: "The drain, as constructed, will permanently affect the rental value of the premises, and in such cases it is the settled law the owner may recover." These authorities all recognize the right of the landlord out of possession to maintain an action on the case for injury to his freehold or inheritance, and so in later cases, under the reform practice, the landlord's right of action, under like conditions, is definitely asserted: Bliss on Code Pleadings, sec. 23. In *Brown v. Bridges*, 31 Iowa, 138, in which a dominant question was whether an action could be maintained by the landlord out of possession for an injury to his real estate in taking up and removing fences, the court, after referring to the rules of the common law applicable to different forms of action, concludes as follows: "We hold, therefore, that under the system of procedure recognized by

the code, the owner of real estate which is in the actual possession of a tenant may maintain an action for an injury to his estate." In *Fitch v. Gosser*, 54 Mo. 267, the trial court had held broadly "that the landlord cannot maintain an action of trespass for trespass committed on the premises while in the possession of his tenants." The supreme court reversed the judgment, saying: "At the common law an action by the owner of land for injuries to the inheritance when the land was rented to tenants was called an action on the case. The tenant could bring trespass for an injury to his possession. This suit, by whatever name it may be called, is for a damage sustained by the owner, and is therefore properly brought by him." The doctrine of these cases would seem to be the meaning of section 2780 of the Compiled Laws: "A person having an estate in fee, in remainder, or reversion may ²⁸² maintain an action for any injury done to the inheritance, notwithstanding an intervening estate for life or years, and although, after its commission, his estate is transferred, and he has no interest in the property at the commencement of the action."

Did the setting of a permanent fence across the land of plaintiff by defendant, thus cutting off a portion of plaintiff's farm, and attaching it to, and inclosing it with, defendant's farm under a claim of ownership by defendant, constitute a material and substantial injury to the freehold other and different and independent of the injury to the tenant's right of possession? We say a "permanent fence" because ordinarily fences are attached to, and become part of, the soil, and this particular fence was set for and designed as a line fence, marking the boundary between plaintiff's and defendant's land. In *Taylor's Landlord and Tenant*, page 136, the law is stated generally as follows: "The landlord's rights, after the tenant's entry, are confined to the protection of his reversionary interest merely; that is, to the maintenance of actions for such injuries as would, in the ordinary course of things, continue to affect such interest after the determination of the lease." "An injury to real estate, while the tenancy exists, may support two actions—one by the tenant, who, in any event, must suffer some legal injury; and one by the reversioner, when the injury is of a nature to affect the reversion": *Cooley on Torts*, 326. In *Lienow v. Ritchie*, 8 Pick. 235, it was held that cutting away a part of a house was such an injury to the inheritance as justified a recovery of damages

by the landlord out of possession. In *Brown v. Bridges*, 31 Iowa, 138, the removal of a fence was held to entitle the landlord to such action. And in numerous cases the flooding of lands, the cutting of timber, the demolition of buildings, and the discharge of rain water from an adjoining roof have supported actions for injury to the inheritance. Now, the same reasoning that would make the wrongful removal of a building or fence actionable would make its wrongful construction actionable. In each case the amount of damages would depend upon the degree of injury proved, but the principle upon which the right of action rested ²⁸³ would be the same in both cases. It could make no difference in principle whether the injury resulted from taking some thing off the land or from putting some thing on. Nor do we see why the injury to the freehold from the removal or the cutting off of improvements from a farm is so essentially different from that resulting from cutting off a part of the farm itself as to justify the distinction which would make one actionable and the other not. We think it would be against the most current ideas of right and justice to say that defendant might plant a fence across plaintiff's farm, thus segregating a portion of it, and making it openly, and under claim of absolute ownership, a part of his own farm, claiming the title, and holding dominion over it adversely to plaintiff, and still be entirely free from liability to the owner of the estate which he has thus chopped up with fences and clouded with a claim of ownership. There are many ways in which such acts might work an injury to plaintiff's estate distinct from their interference with the tenant's right of possession. It was an assertion of title, and an act of occupation under it, which, if plaintiff were incapacitated from resisting, would grow stronger day by day, until by force of prescription it would overcome plaintiff's title entirely. In Wood's edition of Addison on Torts (vol. 1, p. 213) the following language is used: "An action is also maintainable by the reversioner of a mill demised to a tenant, for a diversion by a stranger, of water from the millhead; for if the diversion was allowed to continue with the knowledge of the reversioner, and without interruption from him or his tenant, it might eventually be made the foundation of a legal right to divert the water, to the serious injury of the inheritance." Judge Cooley, speaking upon the same subject, and as to what acts will support action by the reversioner, says: "But if the act be

one which, if persisted in, may at length ripen into an adverse right, an injury will be presumed": Cooley on Torts, 371; *Blanchard v. Baker*, 8 Greenl. 266. Appellant, however, insists that plaintiff could not recover for injury to her reversionary interest, because no such interest is alleged in the complaint, nor is any injury to the reversion complained of. When the complaint ²⁸⁴ states facts constituting an injury to the freehold enduring and permanent, it states a cause of action in favor of the owner of the freehold, whether in or out of possession. We cannot perceive what advantage would be gained by requiring the complaint to state formally and explicitly that the reversion was injured, when the facts pleaded as the cause of action are of such a nature as necessarily to work such injury: *Beaver v. Trimmer*, 25 N. J. L. 97; *Tinsman v. Belvidere etc. R. R. Co.*, 25 N. J. L. 255; 64 Am. Dec. 415. Two cases are cited by appellant as opposing this view: *Uttendorffer v. Saegers*, 50 Cal. 496, and *Tobias v. Cohn*, 36 N. Y. 363. In the former case the complaint alleged ownership and possession in plaintiff of premises described, and of the improvements thereon, consisting of buildings, fruit trees, and grape vines; that defendant forcibly entered upon the premises, tore down the buildings, carried away the materials, and dug up and carried away the grape vines. The opinion is very short and opens with the statement: "The action is trespass *quare clausum*"; and then the court consistently reversed the judgment below, because defendant was not allowed to show that, at the time of the alleged injury, a tenant, and not plaintiff, was in the actual possession of the premises; but the opinion concludes: "However, even if it could be considered as an action brought by a reversioner for injury done to the freehold, the duration of the term of the tenant in possession would be important evidence as affecting the measure of damages to be recovered," thus justifying the reversal to any who might not be entirely satisfied with the first conclusion of the court. Where a complaint shows a permanent and substantial injury to the freehold itself, for which the owner asks damages, we do not quite see how a court can say that the action is for injury to the possession merely, and so cannot be maintained by an owner out of possession. The latter case, according to the statement which precedes the opinion, was trespass for entering a yard or garden in the possession of the plaintiff, erecting a fence across it, and depriving her of the use of more

than half the premises. The court held the action was for injury to the possession, which was in a tenant, and not in plaintiff, and ²⁸⁵ says: "There could not be a recovery for injury to the inheritance, as there were no allegations in the complaint, either of the destruction of the fruit trees and shrubbery, or of the reversionary interest of the plaintiff in the premises." In other words, that the complaint stated neither permanent injury to the freehold, nor any interest of plaintiff in such freehold, except the right of possession, and so did not show any cause of action except in the nature of trespass *quare clausum*. We hold that a substantial and permanent injury to the estate itself constitutes a cause of action in favor of the owner of the estate injured, and that a complaint showing such facts states a cause of action which will let in proof of such injury. The judgment of the circuit court is affirmed.

All the judges concurred.

TRESPASS—NECESSITY FOR POSSESSION.—To maintain trespass, the plaintiff must have possession: *Foster v. Fletcher*, 7 T. B. Mon. 534; 18 Am. Dec. 208, and note. Trespass *quare clausum fregit* can be maintained only by a person in actual possession of the *locus in quo* at the time of the injury; a mere legal or constructive possession will not sustain such action: *McClain v. Todd*, 5 J. J. Marsh. 335; 22 Am. Dec. 37, and note; *Wilsons v. Bibb*, 1 Dana, 7; 25 Am. Dec. 118, and note; *Bakersfield etc. Soc. v. Baker*, 15 Vt. 119; 40 Am. Dec. 668; *Truss v. Old*, 6 Rand. 556; 18 Am. Dec. 748, and note. The owner of land cannot maintain trespass *quare clausum fregit* against one who was in possession at the time he acquired title: *McColman v. Wilkes*, 3 Strob. 465; 51 Am. Dec. 637, and note.

LANDLORD AND TENANT—ACTION FOR TRESPASS BY LANDLORD.—A landlord has neither actual nor constructive possession during the continuance of the lease, so as to enable him to maintain trespass; but the exclusive possession is in the tenant: *Gibbons v. Dillingham*, 10 Ark. 9; 50 Am. Dec. 233, and note; *Torrence v. Irwin*, 2 Yeates, 210; 1 Am. Dec. 340.

TRESPASS—ADVERSE POSSESSION—INJUNCTION.—Where the facts found show that if not prevented, the continuous trespass of the defendants might, by time, ripen into a right adverse to the plaintiff, the plaintiff is entitled to an injunction to protect the superior right without proof of damages: *Mott v. Ewing*, 90 Cal 231.

PROBERT v. McDONALD.

[2 SOUTH DAKOTA, 495.]

PLEADING FRAUD IN TRANSFERS OF PROPERTY.—An allegation that a transfer was made with intent to defraud creditors of the grantor, and that the grantee well knew the intention of the transfer, is a sufficient averment of fraud to support an attack upon such transfer as fraudulent, although there is no allegation that the grantor had no other property subject to execution.

T. H. Null, for the appellant.

O. F. Woodruff and A. Gunderson, for the respondent.

500 KELLAM, P. J. In this case the following facts seem to be undisputed: On and before September 12, 1889, one E. B. Orr was the owner of a lot in Wessington Springs, South Dakota. On that day he conveyed the same by warranty deed to appellant, the consideration named in the deed being five hundred and fifty dollars. Prior to this, and on the twentieth day of August, one Woodburn had sued out a warrant of attachment in an action against Orr, and had levied it upon this lot and livery barn thereon. On the twelfth day of September the attachment was dissolved, and thereafter, on the same day, Orr deeded the property, as above stated, to appellant Probert. October 24th, Woodburn obtained judgment against Orr, upon which execution was issued and levied upon this lot October 31st. It was advertised for sale by respondent, who was the sheriff of Jerauld county, wherein such property was situated. This action was brought by appellant against respondent, as sheriff, to perpetually enjoin such sale. The respondent resists, principally on the ground that the conveyance from Orr to appellant Probert was void, because made with intent to defraud his creditor Woodburn. The allegation of the answer in this respect was general: that said transfer was made by Orr with intent to defraud his creditors, and especially to defraud his creditor Woodburn, and that appellant Probert well knew the motive, and was a party to it, and that the transfer was without consideration. The court found for defendant, and adjudged the conveyance void as against the Woodburn judgment, denying plaintiff the injunction which he sought. From this judgment plaintiff appeals. At the opening of the trial the plaintiff (appellant) objected to the introduction of any evidence under the answer, on the ground that it did not state facts constituting a defense, and the overruling of this objection is the first error assigned.

Appellant contends that the answer is insufficient, in that it states no facts which tend to show, or which would support, an inference of fraud, and that it was also insufficient in not alleging that Orr, the grantor and judgment debtor, had no other property ⁵⁰¹ subject to execution, thus making it necessary to proceed against this lot to collect the judgment.

Upon whom rests the burden of proof under the pleadings in this case is not before us, as the parties have affirmatively agreed that it is with the defendant; and it is probably true, as claimed by appellant, that the sufficiency of the answer as to the allegation of the intent with which the conveyance was made must be tested by the same rule which would determine the sufficiency of a similar allegation in a complaint: Bliss on Code Pleadings, sec. 339, and cases cited. The first question, then, would seem to be, is the allegation that Orr made the transfer with intent to defraud his creditors, and that appellant well knew of his intent, and was a party to the same, sufficient to let in proof of such alleged fraudulent intent? We think the books afford more judicial expressions against than in favor of the sufficiency of such an allegation. Wait on Fraudulent Conveyances, section 141, says: "A mere general averment that a deed was fraudulent, or that it was made with intent to hinder, delay, or defraud creditors, has been regarded as an insufficient method of pleading," and from states having statutes similar to ours sufficient authority may be cited to justify the text; but we are unable to see how, under the statute referred to, a fuller or more elaborate allegation of the fraudulent intent, or how it is to be made to appear, can be required, where the object of the pleading is to put a case within the terms and under the protection of such statute. Section 4656 of the Compiled Laws is as follows: "Every transfer of property . . . made with intent to delay or defraud any creditor . . . of his demands, is void," etc. This is followed by section 4659, which says: "In all cases arising . . . under the provisions of this title, . . . the question of fraudulent intent is one of fact, and not of law, etc. The statute declares that in such case the intent is not a conclusion of law, but a matter of fact. If it were a conclusion of law, it could not be so pleaded; but where the statute definitely fixes its character as a fact, it may be pleaded as a fact. Fraud itself is not a fact, and is never so defined, and so, in pleading fraud, it is not sufficient to plead it by name, simply, ⁵⁰² or to allege

against a party that he committed fraud, but the facts and circumstances must be pleaded from which fraud, as a conclusion or judgment, would be inferred. The statute says that if a conveyance be made, and there exist, in connection with the making of such conveyance, a certain fact, to wit, an intent to delay or defraud creditors, such conveyance is void. Now, a complaint or an answer that alleges just these facts to exist meets all the requirements and conditions of the statute. While the fraudulent intent is usually proved by suggestive facts and circumstances leading to the ultimate fact of intent, it is not necessarily so. It may, in most of the states, be proved directly, as any other fact. The grantor himself may answer as to his intent: *Seymour v. Wilson*, 14 N. Y. 567; *Campbell v. Holland*, 22 Neb. 587; *Gardom v. Woodward*, 44 Kan. 758; 21 Am. St. Rep. 310; *Thacher v. Phinney*, 7 Allen, 146; *Frost v. Rosecrans*, 66 Iowa, 405. In *Sweeney v. Conley*, 71 Tex. 543, it is held otherwise, however, and the reason given is significant in this discussion. The court says: "It has been held repeatedly by this court that the seller or grantor in a transaction alleged to be fraudulent will not be permitted to testify that he made the sale or conveyance in good faith, or that he did not intend to defraud his creditors. The reason for the exclusion of such testimony is, that the question of fraudulent intent, in such cases, is a mixed one of law and fact; and that to say that the intent was not fraudulent, or that the transaction was made in good faith, is to state a legal conclusion." The argument of this opinion plainly is, that if the intent were simply a question of fact, and not one of mixed law and fact, it might be testified to as a fact; but with us, the controlling law peremptorily fixes it as a fact, and nothing else, and under such a rule it should be treated as a fact, both in evidence and in pleading. It would be difficult to give any good reason why, in such case, a party should be required to plead more than he is required to prove, but suppose in an action to avoid a conveyance because made with such fraudulent intent, the only evidence upon the question of intent is that of the grantor and grantee themselves, 503 who testify that, in making the conveyance, they did intend to delay and defraud the grantor's creditors, may not the plaintiff safely stop there? If a witness may testify directly to the existence or nonexistence of such intent as a fact, may not a party plead it as a fact? Or, suppose a complaint in such case allege that the conveyance was made, as

in the words of the statute, with intent to defraud creditors, and the answer does not deny such allegation of intent, and so admits it, is not such allegation of fraudulent intent to be taken as true? But this would not be so if, as appellant contends, the intent were not thus well pleaded. The rule of the code is that the complaint "must contain a statement of the facts constituting the cause of action"—not evidentiary facts, but the ultimate facts; but the fact, that which constitutes the cause of action, is the fact which invalidates and destroys the conveyance, and that fact is, by the express words of the statute, "the intent to delay or defraud creditors." In these remarks we desire to distinguish between fraud itself as a conclusion or inference, and an intent to defraud. The former cannot be said to be a fact, but is the judgment of the law upon a combination of both facts and intent; the latter is by statute made a fact only. A party charged in a pleading with having committed a fraud is entitled to be apprised of the character of the acts from which his fraud is to be inferred, so that he may prepare to defend himself; but when his conveyance is sought to be avoided upon the specific ground that, in making it, he intended to defraud his creditors, the only thing in issue is one single simple fact, to wit, his intent. To plead more would be to plead the evidence. In *Beardsley Scythe Co. v. Foster*, 36 N. Y. 565, the court of appeals held a complaint insufficient because it did not directly aver that the transfer complained of was made with intent to hinder, delay, and defraud creditors, but instead, did just what appellant claims should have been done in this case, to wit, set out the details of the alleged fraudulent arrangement. The views we have expressed as to the sufficiency of such an allegation are fully supported in *Durant v. Pierson*, 8 N. Y. Supp. 904. That was action by a judgment creditor to set aside an assignment ⁵⁰⁴ as fraudulent. The complaint alleged that it was made and accepted with intent to hinder, delay, and defraud creditors. The court held the complaint sufficient, saying: "The allegation that the assignment was made and accepted with intent to hinder, etc., is a sufficient allegation to admit any evidence tending to prove such fraudulent intent on the part of the assignor and assignee. To state the facts on which plaintiff relies to establish this intent would be to set forth evidence. The fraudulent intent is the fact": To the same effect is *Bank v. Reed* (Com. Pl. N. Y.) 12 N. Y. Supp. 920.

It is also claimed that the answer is insufficient because it does not show that the debtor, Orr, had no other property from which the Woodburn judgment might be satisfied. In a creditor's action to set aside a conveyance as fraudulent, it is generally, though not always, held that this fact must appear to justify calling into active exercise the equitable powers of the court, it being a general rule that a court of equity will not take jurisdiction of a controversy if the parties have an adequate remedy at law; but this proceeding is not instituted by the creditor, nor in his interest. He is not trying to get into a court of equity, nor invoking its assistance. He and the controversy are carried there by appellant. He is there, so far as this proceeding is concerned, against his will, resisting the affirmative demand of appellant, by showing reasons why it should not be granted. Under the statute the nullity of the conveyance results from the fraudulent intent with which it is made, and not from the fact that the grantor had no other property with which to pay his debts. The latter fact simply lets the complaining party into a court of equity to prove the first, which is the invalidating fact, and constitutes the real cause of action. Such allegation is necessary, not to give a court of equity jurisdiction over the question, but to justify its exercise. Its jurisdiction over, and power to adjudicate upon, such a controversy grows out of the very nature of the alleged grievance and the character of the relief sought; but if the law affords an entirely adequate remedy, though different in form, equity declines to set its jurisdiction in motion. In such case it declines ⁵⁰⁵ to open its doors to a litigant who does not present the excuse that his legal remedy is insufficient and inadequate; but in this case the equitable power of the court had already taken hold of this controversy at the instigation of the appellant. We think, therefore, there was no error in the trial court entertaining the matter set up in the answer as a defense to appellant's cause of action, without the specific allegation that Orr had no other property from which to satisfy the creditor's judgment, the case coming within the spirit of the rule that when the equity powers of the court have been once brought into action, its active jurisdiction will be continued "until full justice has been done between the parties": *McDaniel v. Lee*, 37 Mo. 204; *Pool v. Docker*. 92 Ill. 501; *Barnes v. Dow*, 59 Vt. 530.

Holding, then, that the pleadings were sufficient to present

for trial the question of the intent with which the conveyance from Orr to the appellant was made, it only remains to consider the effect of the evidence. The following facts plainly appear: Orr, appellant's grantor, was, at the time of the alleged transfer, and had been for more than a year, insolvent; that shortly before the conveyance was made the property had been attached by Woodburn; that Orr was then trying to sell to Price, who, finding that Woodburn had filed *lis pendens*, declined to negotiate further. Orr then declared his intention "to beat Woodburn," if it cost "all the barn was worth." On motion, the attachment was dissolved on the twelfth day of September, and on the same day Orr conveyed to appellant. No money was paid; but the consideration, as claimed by appellant on the trial, was an indebtedness by Orr to appellant, and the unsecured notes of appellant for the balance, amounting to two hundred and fifty dollars; that appellant owned between four hundred dollars and five hundred dollars' worth of personal property, and nothing else. Appellant testified in detail as to Orr's indebtedness to him. Several witnesses were examined as to appellant's reputation for truth and veracity. Their answers to the main question were uniform, and did not leave his statements entirely free from the odor of doubt. Appellant says he knew, when he took the deed, that Woodburn was trying to enforce collection ⁵⁰⁶ of his debt against Orr, and that there had been an attachment on this property. One witness testified that appellant told him that Woodburn was trying to take advantage of Orr, and that "he stepped in for the purpose of helping him out." Orr, whose deed was being challenged, because made with intent to defraud, was present during the trial, counseling with and advising appellant's attorney. His testimony might have thrown much light on the character of the transaction, the intent with which the conveyance was made, and the true consideration for it. He knew all about the very matters in dispute; but he was not sworn. The presumption is not favorable: *Smith v. Tosini*, 1 S. Dak. 632, and cases there cited. We think the judgment of the trial court was right, and it is affirmed.

All the judges concurred.

FRAUDULENT CONVEYANCES—SETTING ASIDE—REQUISITES OF COMPLAINT. A complaint to set aside a fraudulent deed, alleging that it was accepted by the grantee with knowledge of its fraudulent purpose, and as a mere volun-

teer, states a good cause of action: *Rollet v. Heiman*, 120 Ind. 511; 16 Am. St. Rep. 340. Where a creditor attacks a judgment by confession as being fraudulent as to him, on the ground that the object of the debtor and of the judgment creditor was to assist the debtor in forcing a compromise with his creditors rather than have the judgment enforced, he must plead that ground. A general averment in the complaint that the intent was to hinder, delay, and defraud is insufficient: *Meeker v. Harris*, 19 Cal. 278; 79 Am. Dec. 215. In an action to set aside a conveyance as fraudulent, the complaint must aver that the instrument to be avoided was executed with the intent to defraud creditors: *Hutchinson v. First Nat. Bank*, 133 Ind. 271; 36 Am. St. Rep. 537.

MASON v. CITY OF SIOUX FALLS.

[2 SOUTH DAKOTA, 640.]

STREET ASSESSMENTS.—A CHANGE IN THE GRADE OF A STREET MADE AFTER THE RESOLUTION REQUIRING IT TO BE GRADED has been adopted, and after the time for protesting by property owners has expired, renders the proceeding under such resolution void, and a new resolution and proceedings thereunder are necessary before the property can be made liable for an assessment for the costs of grading to the new grade, where the change in the grade materially enhances the costs to the property owners. Whether such a change has resulted is a question of fact to be determined by the court or jury.

STREET ASSESSMENTS.—TO RENDER PROPERTY SUBJECT to the cost of street assessments, the requirements of the statute must be strictly complied with.

STREET ASSESSMENTS.—IF WORK NOT INCLUDED IN THE RESOLUTION OF INTENTION is done upon a street, and the expense thereof included in an assessment, such assessment cannot be enforced unless all the work is properly included therein, in cases where there is no difficulty in determining what was the cost of the work authorized.

STREETS.—A RIGHT TO THE USE OF LAND AS A STREET MAY BE ACQUIRED BY a dedication by the owner, either express or implied. In an implied common-law dedication, it is necessary that there should be an appropriation of land by the owner to public use by some act or course of conduct from which the law will imply such intent.

STREETS.—A DEDICATION OF LAND to public use as a street may be inferred from its use as a street for a much shorter period than would be required to create title by prescription.

STREET ASSESSMENTS.—IT IS NOT NECESSARY THAT A MUNICIPALITY SHOULD HAVE ACQUIRED TITLE TO A STREET to enable it to levy and collect assessments for the improvement thereof. It is sufficient that the owner of the fee has permitted the land to be used as a street for such a length of time that the public accommodation and private rights might be materially affected by the interruption of the enjoyment.

A STREET ASSESSMENT CANNOT BE RESISTED ON THE GROUND THAT THE MUNICIPALITY HAS NO TITLE to the property used and improved as a street, unless it also appears that the city will probably not acquire title to such street, and that the benefit of any improvement to be made will be lost to the public.

Charles L. Brockway, for the appellants.

Keith and Bates, for the respondents.

642 CORSON, J. This was an action to enjoin the defendants from selling certain real estate of the plaintiff charged with a special assessment for grading and curbing Prairie avenue, from Fourth to Twelfth streets, in the city of Sioux Falls. Judgment for plaintiff, and defendants appeal. The facts, briefly stated, are that, in 1881, one John McClellan was the owner of the northeast quarter of section 17, township 101, range 49. In that year he platted a portion of the land into lots and blocks, and called it "McClellan's Addition to West Sioux Falls." On the west side of the blocks platted, from block No. 19 to 24, inclusive, extending from First to Sixth streets, no street was laid out, so far as shown by the plat of said addition. Some time subsequently, said McClellan conveyed to plaintiff a portion of said tract of land not platted by metes and bounds, commencing at a point 66 feet westerly from the southwest corner of block 23 of said addition, and so described it as to leave a strip of land 66 feet in width between the land of plaintiff, and said block 23 in his addition. In 1884 McClellan conveyed to the public by deed a strip of land 33 feet in width, adjoining on the west block 24, and extending about one-half the length of **643** block 23, and about one-half the length of the land so purchased by plaintiff of said McClellan; also, in the same deed, he conveyed to the public a strip of land 66 feet in width between blocks 19 and 20 of McClellan's addition on the east side, and of blocks 25 and 26 in McClellan's second addition on the west side; and in the deed of the same is the following clause: "The same to be a public highway, and form a continuation of the street known as 'Prairie avenue,' in the city of Sioux Falls." On the map or diagram the land of plaintiff, with that of Joseph M. Mason (which originally constituted a part of the tract conveyed by McClellan to plaintiff), as shown, constitutes a block extending from Fourth to Fifth streets, and fronts on Prairie avenue, is 66 feet in width, and is directly west of, and opposite, block 23 of McClellan's addition. North of plaintiff's land, and on the west side of what is claimed by defendants to be Prairie avenue, are two blocks, constituting Cooper's addition, and being a part of the same quarter section, and north of these lies McClellan's second addition. How far north of First street, or south of Twentieth

street, Prairie avenue extends is not shown, and whether graded or not does not appear. In September, 1889, the city council passed a resolution that it was necessary that Prairie avenue should be graded between Fourth and Twelfth streets, and that the cost of such improvement should be met by special assessments upon the property abutting on the same. This resolution seems to have been duly published in the official paper of the city, and no protest of the property owners along said Prairie avenue seems to have been filed. In April, 1890, a contract was let by the city to one Small, to grade and curb the said avenue. After this contract was made, the city council passed an ordinance changing the grade of Prairie avenue between Fourth and Twelfth streets. No new resolution was adopted by the city council for grading the avenue after so changing its grade, but the contract was completed as originally made. The cost of the grading and curbing was apportioned and assessed to the property owners abutting on the avenue, and the time for payment having expired, the city was ⁶⁴⁴ about to proceed to sell the property when this suit to restrain such sale was commenced.

The grounds mainly relied on by the plaintiff for annulling the special assessment proceedings, as set out in her complaint, were: 1. That the cost of curbing Prairie avenue was included in the assessment, for which the property owners were not liable, as the curbing was not specified in the resolution for grading; 2. Because, after the resolution for grading the avenue was adopted, published, and the time for the property owners to protest had expired, and a contract for the grading had been let, the grade was changed by ordinance, and no new resolution adopted; and 3. Because the title to the westerly strip of land 33 feet in width, in front of plaintiff's premises, was not in the city, but in McClellan, and that, therefore, her property did not abut upon Prairie avenue, and was not subject to the assessment.

On the trial, the plaintiff called as a witness one W. H. Holt, city auditor, and after he had given the usual preliminary evidence as to the ordinance changing the grade—being No. 112, passed June 2, 1890—the ordinance was offered in evidence. It was objected to by the counsel for the city, for the reason that by the charter of the city the matter of establishing the grades of streets was placed under the control of the common council, and that body was authorized to establish and change such grade at will, and that the fact that

the grade of Prairie avenue was changed after the contract to grade the same was executed is not material in this case. The court overruled the objection. We are of the opinion that the court ruled correctly. We have no doubt but that, as contended by the counsel for the city, the common council had the right to establish the grades of streets, and change them at will, under the provisions of the law, and subject to the limitations in the law. But the exercise of this power is not without limitation other than that contained in the law. It cannot be exercised to the injury of the property owners after a resolution has been adopted and published requiring a street or avenue to be graded, and the time for protesting by the property owners has ⁶⁴⁵ expired. Such a change in the grade might seriously affect property owners, by largely increasing the burden imposed upon them by the resolution as originally adopted, and against which grading they might have protested had the grade been changed prior to the resolution requiring the grading to be done. When the grade established is so changed as to materially affect the interests of the property owners after the resolution is adopted declaring the necessity of grading the street, in our opinion the proceedings under the resolution become null and void, and a new resolution, publication, etc., are required before the property can be made legally liable for the cost of such grading. A slight change, however, which does not materially enhance the cost of grading to the property owners, and which, had it been made prior to the publication of the resolution, would not have changed the course adopted by the property owners, will not vitiate the proceedings. It is therefore a question of fact to be determined by the jury, or court sitting as a jury, whether or not such change has materially increased the cost of the grading, and how far the change may have affected the property holders injuriously. In this case there was no evidence as to the extent of the change in the grade, or whether it increased or diminished the cost of the grading, and the ordinance itself could afford the court but little aid in solving the question; but as it was competent to show that such change had been made, the ordinance was the best evidence of that fact, and was therefore properly admitted in evidence for that purpose. But, without other evidence showing the materiality of the change, the court could not say that the proceedings were

irregular, or that the assessment should for that reason be held invalid.

The appellants also contend that the court erred in sustaining plaintiff's objection to the following question, asked defendants' witness Howe: "Of what did the curbing consist"? This was objected to as incompetent and immaterial. The objection was sustained. The defendants then offered to show that the curbing was necessary in grading this avenue to keep the roadbed in its place. This offer was objected to and the objection ⁶⁴⁶ sustained. We are of the opinion that the court properly sustained plaintiff's objections to this evidence. The resolution under which the grading in this case was done is as follows: "Resolved, that it is necessary that Prairie avenue, between Fourth and Twelfth streets, in said city of Sioux Falls, be graded and worked to the established grade of said avenue." It will be noticed that curbing is not mentioned in the resolution, and the city cannot, therefore, hold the property owners or the property liable for the cost of the curbing. To render property subject to the cost of street improvements, the requirements of the statute must be strictly complied with. Section 973 of the Compiled Laws provides: "When the city council shall deem it necessary to open, widen, extend, grade, pave, macadamize, bridge, curb, gutter, or otherwise improve any street, alley, avenue, lane, or highway, or other public grounds within the city limits, for which a special assessment is to be levied as herein provided, the city council shall, by resolution, declare such work or improvements necessary to be done, and such resolution shall be published for four consecutive weeks at least once a week in the official newspaper of the city," etc. It further provides that, if within twenty days after such publication a majority of the property owners do not file a written protest, the city council shall have power to contract for the work to be done, and levy and collect assessments to pay the cost of the same. The resolution adopted and published must specifically designate the work declared necessary to be done, and the property owners and the property will only be liable for the cost of such improvements as are so specifically designated in the resolution and published in the official paper. This resolution and publication thereof is the only notice required to be given property owners that the improvement is ordered made, and the improvements, therefore, contracted for must conform strictly to the improvements designated in the resolution

adopted and published, and for such as are not specifically designated the city cannot impose the cost upon property owners or the property abutting upon the improvements. It is a well-settled rule that when a municipal corporation seeks to ⁶⁴⁷ impose upon citizens the burden of making public improvements, and to hold the property of the individual liable therefor, the statute authorizing such improvements at the expense of the citizen must be strictly pursued: 2 Desty on Taxation, 1241; 2 Dillon on Municipal Corporations, sec. 769; 1 Blackwell's Tax Titles, sec. 612; *Merritt v. Village of Portchester*, 71 N. Y. 309; 27 Am. Rep. 47; *Hewes v. Reis*, 40 Cal. 255; *McLauren v. City of Grand Forks*, 6 Dak. 397; *White v. Saginaw*, 67 Mich. 33; *Hoyt v. Saginaw*, 19 Mich. 39; 2 Am. Rep. 76; *Pound v. Chippewa Co.*, 43 Wis. 63. But while the property cannot be held for the cost of the curbing, it may be held for the grading, when the cost of grading, independently of the curbing, can be ascertained. In this case there seems to be no difficulty in ascertaining the cost of the grading, as the curbing was contracted for as a separate item.

This brings us to the consideration of the more important question in this case. On the trial the counsel for the city asked witness Blackman the following question: "State what you know about that strip of ground in front of the Mason property, running from there north and south—about its being traveled as a public street." This was objected to by the counsel for the plaintiff as incompetent and immaterial, and as not being a proper way to prove it is a highway, and also because the evidence shows that no resolution was ever adopted by the city council to widen or alter, or in any way change, Prairie avenue. The objection was sustained, and exception taken. Counsel for the city then made the following offer: "Defendants' counsel offers to show that ever since, and prior to, the 6th of June, 1881, a strip of ground sixty-six feet in width, running north and south, on the west side of what is known and designated on the plats of the city of Sioux Falls as 'McClellan's Addition to West Sioux Falls,' and in front of and adjoining the property of the plaintiff in these cases, has been used and traveled as a highway, and has been so used and traveled with the knowledge and consent of John McClellan, the former fee owner of the northeast quarter of section 17, township 101, range 49, upon which said grounds are located." The same ⁶⁴⁸ objection was

made to this offer. Same ruling and exception. For the purposes of this case we must assume that counsel could have proved the facts contained in his offer, and upon this assumption we are of the opinion that this evidence should have been admitted, and that its exclusion was error.

One of the grounds relied on by the plaintiff to maintain her action was, that the strip of land thirty-three feet in width, in front of her premises, was not a part of Prairie avenue; or, in other words, that Prairie avenue, in front of her premises, was only thirty-three feet in width, and that between her premises and the avenue was a strip thirty-three feet in width that belonged to McClellan, and not to the city. It was admitted by the city that the legal title to this strip was in McClellan, but it contended that by his acts he had dedicated to the city an easement in it for a public street, and that it properly constituted a part of Prairie avenue. Among the methods of acquiring the right to the use of land for a street is that of dedication by the owner, either express or implied. In an implied common-law dedication it is necessary that there should be an appropriation of land by the owner to public use by some act or course of conduct from which the law will imply such an intent: *Elliott on Roads and Streets*, 92. It is true, an actual intent to dedicate the land to public use must be found to exist, but proof of user for a period much shorter than that required to show title by prescription may be sufficient to prove such intent and dedication. The extent and character of the use may furnish evidence of the intention to so dedicate. In the case of *Cincinnati v. White*, 6 Pet. 431, a leading case upon this subject, the supreme court of the United States, speaking by Mr. Justice Thompson, says: "The right of the public in such cases does not depend upon a twenty years' possession. Such a doctrine, applied to public highways and the streets of the numerous villages and cities that are so rapidly springing up in every part of our country, would be destructive of public convenience and private right. The case of *Jarvis v. Dean*, 3 Bing. 447, shows that rights of this description do not rest upon length of possession. The plaintiff's right to recover in that case turned upon the question whether ⁶⁴⁹ a certain street in the parish of Islington had been dedicated to the public as a common public highway. Chief Justice Best, upon the trial, told the jury that, if they thought the street had been used for years as a public thoroughfare,

with the assent of the owner of the soil, they might presume a dedication; and the jury found a verdict for the plaintiff, and the court refused to grant a new trial, but sanctioned the direction given to the jury and the verdict found thereupon, although this street had been used as a public road only four or five years; the court saying the jury were warranted in presuming it was used with the full assent of the owner of the soil. The point, therefore, upon which the establishment of the public street rested was, whether it had been used by the public as such, with the assent of the owner of the soil; not whether such use had been for a length of time which would give the right by force of the possession, nor whether a grant might be presumed, but whether it had been used with the assent of the owner of the land; necessarily implying that the mere naked fee of the land remained in the owner of the soil, but that it became a public street by his permission to have it used as such. Such use, however, ought to be for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment." In *Case v. Favier*, 12 Minn. 89, the court says: "It is not necessary to establish dedication to show an adverse, exclusive, and uninterrupted possession of the premises for twenty years, with the actual or presumed knowledge of those interested. The right of the public does not rest upon a grant by deed, nor twenty years' possession, but upon the use of the land, with the assent of the owner, for such length of time that the public accommodation and private right might be materially affected by an interruption of the enjoyment. The length of time of the user is a fact for the jury to consider, as tending to prove an actual dedication and acceptance by the public." In this case the public had used the premises less than ten years: *Hobbs v. Inhabitants of Lowell*, 19 Pick. 405; 31 Am. Dec. 145; *City of Chicago v. Wright*, 69 Ill. 318; *Cemetery Assn. v. Meninger*, 14 Kan. 312; 2 Dillon on Municipal Corporations, § 630, sec. 638, and cases cited; 2 Greenleaf on Evidence, sec. 662; Elliott on Roads and Streets, 126.

The facts in evidence in this case, when the offer by the defendants was made, were such as to raise a strong presumption of dedication of this avenue between First and Sixth streets to the public. The leaving a strip of land sixty-six feet in width by McClellan between his addition and the land of plaintiff; subdividing his westerly tier of blocks into lots

facing the west; conveying a strip sixty-six feet in width between his two additions in 1884; the laying out of Cooper's addition so as to leave sixty-six feet between that and his other property—all tended strongly to show that he intended that sixty-six foot strip for the public use. These facts, followed by the evidence offered, that the whole sixty-six foot strip had been used before and since 1881 as a public highway, with the knowledge of, and without objection by, McClellan, might have been taken by the jury to establish at least a *prima facie* case of a dedication.

But the evidence was clearly admissible upon another ground. As the plaintiff contended her property did not adjoin or abut upon Prairie avenue, because the city did not own the thirty-three foot strip in front of her property, it was competent for the city to show that this thirty-three feet was used by the public, as well as the easterly thirty-three feet adjoining McClellan's addition, and that it was exercising control over it by grading it the whole width. If such was the case, and the property was of such a character that the city could appropriate it or acquire an easement therein for the use of the public, the plaintiff could not defeat the city in its efforts to enforce the collection of the street assessments, on the ground that it did not absolutely own the thirty-three feet in question. Whether it had acquired the title or not was not material to the plaintiff, so long as the same was used by the public, and the right to so use it might be acquired by the city if it did not already possess the right by dedication or otherwise. The views expressed by the supreme court of Illinois in an analogous case (*Holmes v. Village of Hyde Park*, 121 Ill. 128) fully meet our approval. In that case the court says: "The question here is, whether the owner of property ⁶⁵¹ specially assessed for the purpose of grading and paving a street of an incorporated village can interpose the objection, on an application to the court to confirm the assessment, that the village has not acquired title to the soil to be graded and paved as a street. . . . Whether the compensation shall be made to the owner of the soil for the land taken for the street before or after the assessment for its improvement cannot make that assessment either larger or smaller; and so, whether title to the soil, entered upon for the purposes of the street, has been heretofore, or remains to be hereafter, acquired, is a distinct question from that of the benefits and damage to result to the adjacent landowner from the improvements of

such street, and the latter has no dependence on the former. The owner or claimant of ownership of the soil covered by the street is not, as such, merely required to be made a party to the assessment proceedings, and manifestly could not, therefore, be concluded or materially affected in his rights by the judgment confirming the assessment. It may be, if it were made to appear that there was probability that the village would not acquire title to the street, and so that the benefit of any improvement to be made by aid of the special assessment would be lost to the public, a bill in chancery would lie to enjoin the assessment proceedings until the title should be acquired; but then all the claimants to title would be parties, and concluded by the adjudication. The judgment is affirmed": *Village of Hyde Park v. Borden*, 94 Ill. 26. That case seems to lay down a just and proper rule. Cities cannot, in improving their streets, alleys, etc., be called upon by the citizen in every case to show that they have the legal title to the property they are seeking to improve before they can enforce the collection of assessments made for such improvements. It is sufficient for the city to show that the street, avenue, or alley sought to be improved is one that has, for a considerable length of time, been used as a public street, and is such property as can be appropriated by the city, and is, in the language of Chief Justice Shaw in *Hobbs v. Inhabitants of Lowell*, 19 Pick. 405, 31 Am. Dec. 145, a street *de facto*. For the error of the court in excluding the evidence offered, the judgment of the court below is reversed and a new trial ordered.

All concurred.

DEDICATION TO PUBLIC USE, WHEN PRESUMED.—To constitute a sufficient dedication there must be the intention on the part of the owner to make the gift, and also an acceptance. The owner's intention may be manifested in writing by declarations or by acts: *Gentleman v. Soule*, 32 Ill. 271; 83 Am. Dec. 284, and note; *Hogue v. Albana*, 20 Or. 182; *City of Hartford v. New York etc. R. R. Co.*, 59 Conn. 250; *Moffett v. South Park Commrs.* 138 Ill. 620; *Starr v. People*, 17 Col. 458. There is no form necessary for the dedication of lands to a public use. All that is required is the assent of the owner of the land and the fact of it being used for a public purpose intended by the dedicator: *County of Yolo v. Barney*, 79 Cal. 375; 12 Am. St. Rep. 15.; *Denver v. Jacobson*, 17 Col. 497; *Morrison v. Marquardt*, 24 Iowa, 35; 92 Am. Dec. 444; *David v. New Orleans*, 16 La. Ann. 404; 79 Am. Dec. 586. Dedication may be implied from a series of acts: *Archer v. Salinas City*, 93 Cal. 43. See, further, the extended note to *State v. Trask*, 27 Am. Dec. 559; and the notes to *Oauge City v. Larkin*, 10 Am. St. Rep. 189; *Board of Supervisors v. Seal*, 14 Am. St. Rep. 549; and *People v. Reed*, 15 Am. St. Rep. 33.

DEDICATION TO PUBLIC USE—TIME OF USER.—Land may be dedicated to public use by the owner without deed, and need not when so dedicated be used for any particular period of time to establish the right of the public to have it so continued: *State v. Catlin*, 3 Vt. 530; 23 Am. Dec. 230; *Dwinel v. Barnard*, 28 Me. 554; 48 Am. Dec. 507, and note; *Cole v. Sprowl*, 35 Me. 161; 56 Am. Dec. 696; *Weiss v. South Bethlehem*, 136 Pa. St. 294.

MUNICIPAL CORPORATIONS—ASSESSMENTS—CONSTRUCTION OF STATUTES.—Statutes conferring power upon municipalities to make assessments for street improvements must be strictly construed: *Niklaus v. Conkling*, 118 Ind. 289; *Keese v. Denver*, 10 Col. 112; *Flewelling v. Proetzel*, 80 Tex. 191; *Merritt v. Portchester*, 71 N. Y. 309; 27 Am. Rep. 47; *State v. Commissioners*, 39 N. J. L. 190; 20 Am. Rep. 380.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

WISCONSIN WATER COMPANY v. WINANS.

[85 WISCONSIN, 26.]

EMINENT DOMAIN.—LEGISLATURE HAS NO POWER TO AUTHORIZE TAKING OF PRIVATE PROPERTY for a private use without the owner's consent, even upon the making of just compensation therefor.

EMINENT DOMAIN.—NECESSITY FOR TAKING LANDS FOR PUBLIC USE by right of eminent domain is one to be determined by the legislative department of the government, but it may delegate the exercise of such legislative authority to town or municipal officers.

EMINENT DOMAIN—PUBLIC USE—WHO DETERMINES WHAT IS.—Whether a particular use for which land is taken under the exercise of the right of eminent domain is public or not, is for the judiciary to determine.

EMINENT DOMAIN.—PUBLIC USE and a legislative warrant of the necessity of the taking must coexist as conditions precedent to the right of condemnation of land under the exercise of the right of eminent domain.

EMINENT DOMAIN—PUBLIC USE—WHAT IS NOT.—A corporation organized to construct and maintain water works and connections for supplying a city with water cannot maintain proceedings to condemn lands not within the city limits for the purpose of laying its pipe lines, without proof that it has a legal right to condemn land within such city, or has a right to construct or maintain water works or lay pipes therein, or to dispose of the water conveyed by the pipe line to the inhabitants of such city. Without this proof no public use is shown.

E. Merton, T. E. Ryan, T. W. Haight, W. W. Wight, and D. H. Sumner, for the appellants.

Quarles, Spence and Quarles, for the respondent.

30 **CASSODAY, J.** The statutes provide, in effect, that for the construction and maintenance of water works for the supply of any city or village in this state, or the inhabitants thereof, with water for protection against fire, or for domestic

use or sanitary purposes, every corporation formed for such purpose under the laws of this state is hereby authorized to acquire the title in fee simple to, or such easement in, or servitude upon, all such lands as may be necessary for the construction or maintenance of such works, and to hold and use the same for that purpose; and such lands and interests therein may be acquired by such corporations in the manner provided by sections 1845-1857 of the Revised Statutes: Sanborn and Berryman's Annotated Statutes, sec. 927 b; Laws 1882, c. 325; Laws 1883, c. 165. Such a corporation may, it would seem, be formed in the manner prescribed by chapter 86 of the Revised Statutes, as amended—although such purpose is not specifically named in section 1771—in view of the context and the provisions of the act giving such authority to such corporation, and the general clause in the section last cited, which reads: "Or for any lawful business or purpose whatever, except the business of banking, insurance, building, or operating public railroads, or plank or turnpike roads, or other cases otherwise specially provided for." This seems to be broad enough to authorize the formation of corporations "for the construction and maintenance of water works for the supply of any city or village in this state, or the inhabitants" thereof, "with water for protection against fire, or for domestic use or sanitary purposes."

The question here involved is whether the record presents a case authorizing the petitioner to condemn the lands described in the petition for the purposes mentioned. The contest is not one between the petitioner and the village of Waukesha or its inhabitants, or the owners of rival springs, but, so far as the law is concerned, the contest is solely between the petitioner and the owners of the land sought to ³⁹ be condemned. "The property of no person shall be taken for public use without just compensation therefor": Const., art. 1, sec. 13. It is firmly settled that the legislature has no power to authorize the taking of private property for a private use without the owner's consent, even upon the making of just compensation therefor: *Pratt v. Brown*, 3 Wis. 612; *Osborn v. Hart*, 24 Wis. 89; 1 Am. Rep. 161; *Culbertson v. Coleman*, 47 Wis. 200; *Embury v. Conner*, 3 N. Y. 511; 53 Am. Dec. 325, and notes; *Cole v. La Grange*, 113 U. S. 1; *Lewis on Eminent Domain*, sec. 157. This court has repeatedly held, in effect, that the question of the necessity for taking lands for public use by right of eminent domain is one to be determined by the legis-

lative department of the government: *Smeaton v. Martin*, 57 Wis. 364; *Smith v. Gould*, 59 Wis. 641; *State v. Stewart*, 74 Wis. 630. See *United States v. Oregon Ry. & Nav. Co.*, 16 Fed. Rep. 524. Thus, it is said by Mr. Lewis, in the work mentioned, that "necessity, expediency, or propriety of exercising the power of eminent domain, and the extent and manner of its exercise, are questions of general policy, and belong to the legislative department of the government": Lewis on Eminent Domain, sec. 162. So, this court has held, in the cases cited, that while the necessity for such taking is to be determined by the legislature, yet it may delegate the exercise of such right to town or municipal officers. While the legislature cannot divest itself of sovereign powers, yet in the exercise of such powers it may select such agencies as it pleases, and confer upon them the right of taking private property for public use, subject only to the limitations contained in the constitution: Lewis on Eminent Domain, sec. 242. "It may be regarded as settled law that it is solely for the legislature to judge what persons, corporations, or other agencies may properly be clothed with this power": Lewis on Eminent Domain, sec. 242, and cases there cited. The question of such necessity, however, seems to be entirely distinct from the question of ⁴⁰ such public use. Of course, the legislature or its agency must, in the first instance, determine whether the use for which it is proposed to make the condemnation is a public use; but such determination is not final as to the character of the use: Lewis on Eminent Domain, sec. 158. In the same section it is said: "All the courts, we believe, concur in holding that whether a particular use is public or not, within the meaning of the constitution, is a question for the judiciary": See, also, *Talbot v. Hudson*, 16 Gray, 417; *In re Deansville Cemetery Assn.*, 66 N. Y. 569; 23 Am. Dec. 86; *In re Niagara Falls etc. Ry. Co.*, 108 N. Y. 375; *Coster v. Tide-water Co.*, 18 N. J. Eq. 54; *In re St. Paul etc. Ry. Co.*, 34 Minn. 227; *Tyler v. Beacher*, 44 Vt. 648; 8 Am. Rep. 398; *Smeaton v. Martin*, 57 Wis. 364.

It would be very difficult, if possible, to define in a single sentence just what constitutes a public use, as determined by the adjudged cases. Mr. Lewis says, in effect, that it is the power of the "state to appropriate private property to particular uses for the purpose of promoting the general welfare": Sec. 163. That "public use means the same as use by the public, and this, it seems to us, is the construction the words

should receive in the constitutional provision in question": Sec. 165. "Though the property is vested in private individuals or corporations, the public retain certain definite rights to its use or enjoyment, and to that extent it remains under the control of the legislature. If no such rights are secured to the public, then the property is not taken for public use, and the act of appropriation is void": Sec. 165. The mill-dam act was upheld in this state, on the ground that the land flowed by virtue of it, and the water power thereby created was devoted to a public use: *Thein v. Voegtlander*, 3 Wis. 461; *Pratt v. Brown*, 3 Wis. 603; *Fisher v. Horicon Iron Mfg. Co.*, 10 Wis. 351. Where such mill is engaged in doing custom work for any and all who apply, it may well be regarded as devoted to a public⁴¹ use: *Sadler v. Langham*, 34 Ala. 325. So, it has been held in this state that the taking of land for the construction of a ditch to drain a public highway is the taking of it for a public use: *Smeaton v. Martin*, 57 Wis. 364. Water works for the supply of a city or village in this state, or the inhabitants thereof, with water for protection against fire, or for domestic use or sanitary purposes, may be devoted to the general welfare of such municipality or its inhabitants, and, if so devoted, we perceive no reason why they should not be regarded for the public use: *Attorney General v. Eau Claire*, 37 Wis. 400; *Wayland v. Middlesex Co. Commrs.*, 4 Gray, 500; *In re Middletown*, 82 N. Y. 196; *Stamford Water Co. v. Stanley*, 39 Hun, 424; *In re New Rochelle Water Co.*, 46 Hun, 525; *St. Helena Water Co. v. Forbes*, 62 Cal. 182; 45 Am. Rep. 659. In Kentucky it has been held that "necessity and a public use must, in all cases, exist as a condition precedent to the legal right of a railway company to enforce the remedy given by a charter to condemn property": *Tracy v. Elizabethtown etc. R. R. Co.*, 80 Ky. 259. In the same case it was held that "the company is not the judge of the necessity for the condemnation of the property, or of the character of its use. The decision of both of these questions belongs to the court." In *In re Niagara Falls etc. Ry. Co.*, 108 N. Y. 375, it was held, in effect, that a railroad corporation seeking to take property *in invitum* for the purposes of its road must be able to show, 1. A legislative warrant; and, 2. If the right is challenged, that the business it is organized to carry on is public, and that the taking of private property for its purposes is a taking for public use; and that the question as to whether the uses are in fact public, so as to justify such taking, is a judicial

one, to be determined by the courts: See, also, *Citizens' Water Works Co. v. Parry*, 59 Hun, 202, affirmed 128 N. Y. 669; ⁴² *Edgewood R. R. Co.'s Appeal*, 79 Pa. St. 257; *Sterling's Appeal*, 111 Pa. St. 35; 56 Am. Rep. 246.

Upon the authorities cited, as well as reason, we are constrained to hold that a legislative warrant of the necessity of the taking, and that the same is for a public use, must coexist as conditions precedent to the right of condemnation in all cases. Especially should this be so where, as here, the corporation is created by the incorporators under the general laws. Here, as indicated in the foregoing statement, the petitioner only seeks to condemn for its pipe line from its springs in Waukesha, by way of Darling place, to the city limits of Milwaukee. There is nothing in the record showing any legal right in the petitioner to enter upon or condemn land in that city. It does not appear that the petitioner has secured, by way of contract or otherwise, the right to construct or maintain water works or to lay pipe therein, or to sell or dispose of the water so to be conveyed by pipes to the inhabitants of that city. For aught that appears, such pipe line may terminate at such city limits, or the water to be conducted through the same be there put to private use. There can be no public use, except in supplying the city or its inhabitants with water for the uses and purposes mentioned. Until the right to so supply the city or its inhabitants with water is secured, there can be no right to condemn. The declared purpose of the petitioner is to take the water from its springs, and convey it through the pipes to be laid to the city, and there to supply the city or its inhabitants. The transportation is purely incidental to such supply for such public use in the city. Without the right in the petitioner to so supply for such public use, the condemnation here sought, to lay such pipe, would necessarily be independent of such public use. It is entirely unlike a railroad, which is used by the public along the whole line. In the ⁴³ case at bar the right to so supply for such public use at the terminus gives character to the whole enterprise. We are forced to the conclusion that the showing made was insufficient to authorize such condemnation.

By the COURT. The order of the circuit court is reversed, and the cause is remanded with direction to dismiss the proceedings.

EMINENT DOMAIN—NECESSITY FOR PUBLIC USE.—The right of eminent domain should be exercised only when the uses for which the property is taken are strictly public: *Cooper v. Williams*, 4 Ohio, 253; 22 Am. Dec. 745, and note; *Taylor v. Nashville etc. R. R. Co.*, 4 Cold. 646; 98 Am. Dec. 474; *Lance's Appeal*, 55 Pa. St. 16; 93 Am. Dec. 722, and note; *Ex parte Martin*, 13 Ark. 198; 58 Am. Dec. 320; *Harding v. Goodlett*, 3 Yerg. 40; 24 Am. Dec. 546; *Consumers' Gas Trust Co. v. Harless*, 131 Ind. 446; *Railway Co. v. Telford*, 89 Tenn. 293. A constitutional provision authorizing the taking of private property for public use prohibits, by implication, the taking of private property for any private use whatever without the consent of the owner: *Richards v. Wolf*, 82 Iowa, 358; 31 Am. St. Rep. 501. This question will be found discussed further in the notes to *Bloodgood v. Mohawk etc. R. R. Co.*, 31 Am. Dec. 372; *Taylor v. Porter*, 40 Am. Dec. 280; extended notes to *Embury v. Conner*, 53 Am. Dec. 336; and *Beekman v. Saratoga etc. R. R. Co.*, 22 Am. Dec. 686; and *Gainsville etc. Ry. Co. v. Hall*, 22 Am. St. Rep. 49.

EMINENT DOMAIN—POWER OF LEGISLATURE.—The time, manner, and occasion for the exercise of the right of eminent domain are wholly within the control and discretion of the legislature, except as restrained by the constitution: *Consumers' Gas Trust Co. v. Harless*, 131 Ind. 446; *Illinois Cent. R. R. Co. v. Chicago*, 141 Ill. 586; *Musick v. Kansas City etc. Ry. Co.*, 114 Mo. 309; *O'Hare v. Chicago etc. Ry. Co.*, 139 Ill. 152; extended notes to *Beekman v. Saratoga etc. R. R. Co.*, 22 Am. Dec. 692, and *Gainsville etc. Ry. Co. v. Hall*, 22 Am. St. Rep. 48.

EMINENT DOMAIN—DELEGATION OF LEGISLATIVE AUTHORITY TO EXERCISE.—The power of eminent domain may be exercised by the state through subordinate agencies, and need not be exercised directly by the legislature itself: *Backus v. Lebanon*, 11 N. H. 19; 35 Am. Dec. 466, and note; *Bloodgood v. Mohawk etc. R. R. Co.*, 18 Wend. 9; 31 Am. Dec. 313, and note; *Alexander v. Mayor*, 5 Gill, 383; 46 Am. Dec. 630; *O'Hare v. Chicago etc. Ry. Co.*, 139 Ill. 152.

EMINENT DOMAIN.—PUBLIC USE, QUESTION AS TO WHAT IS JUDICIAL: See the extended note to *Beekman v. Saratoga etc. R. R. Co.*, 22 Am. Dec. 691, and the note to *Rumsey v. New York etc. Ry. Co.*, 28 Am. St. Rep. 608.

EMINENT DOMAIN—WHAT ARE NECESSARY PUBLIC USES.—For a discussion of this question see the note to *Rumsey v. New York etc. Ry. Co.*, 28 Am. St. Rep. 608, and the extended note to *De Voss v. City of Richmond*, 98 Am. Dec. 667; *Beekman v. Saratoga etc. R. R. Co.*, 22 Am. Dec. 686; *Felton v. New Haven*, 26 Am. Rep. 457, and *Appeal of Sharon Ry. Co.*, 9 Am. St. Rep. 142.

CITY OF RACINE v. EMERSON.

[85 WISCONSIN, 80.]

BOUNDARIES—ANCIENT PLATS AND SURVEYS.—Monuments set at the time of an original survey on the ground, and named or referred to in the plat, are the best evidence of the true line. If there are none such, then stakes set by the surveyor to indicate corners of lots or blocks, or the lines of streets, at the time, or soon thereafter, are the next best evidence. A building or fence constructed according to such stakes, while they were present, becomes a monument after such stakes have been removed or disappeared, and the next best evidence of the true line. A resurvey that changes lines and distances, and purports to correct inaccuracies or mistakes in the old plat, is not competent for that purpose.

BOUNDARIES—ANCIENT PLATS AND SURVEYS.—The lines of streets and lots, as established by a city plat built upon and acquiesced in for more than forty years, cannot be destroyed or disturbed by a subsequent city survey made from the original monuments apportioning the blocks and streets after the first street is surveyed, and changing the lines of the street accordingly.

BOUNDARIES—ANCIENT PLATS AND SURVEYS—EVIDENCE.—In a case of disputed boundary, the testimony or acts of the surveyor who originally established it, and who pointed out the stakes set by himself to mark the lines after many years, accompanied by continued use and occupation in recognition of such lines, is not only proper, but strong evidence that such were the true lines, and is better evidence than a new survey made more than forty years afterwards, which changes such lines.

J. E. Dodge, for the appellant.

Samuel Ritchie, for the respondent.

83 ORTON, J. This action is to recover the penalty, under a city ordinance, for the maintenance of an obstruction by the defendant, consisting of a fence in front of lots 11 and 12, in block 10, on the plat made by one Moses Vilas, in 1842, of section 16—the school section—as an addition to the village of Racine, on the east side of Wisconsin street. It is claimed that said fence is within the east side of Wisconsin street, two feet at one corner of said lots, and two feet eight inches at the other corner. The defendant has been present with this fence, standing substantially where it is now, since 1848, so that if this fence is an obstruction to Wisconsin street, it is a very ancient one, and the defendant has been guilty of maintaining it over forty years. The following seem to be the facts established by the evidence:

This fractional section 16 was surveyed and platted under an act of the territorial legislature requiring such duty to be performed by the school commissioners of the **83** village of Racine, by one Moses Vilas, a surveyor, and competent to do

such work, first in 1842. The north and south streets on this plat were intended to correspond with, and to be a continuance of, the north and south streets in the old village plat of section 9. The first street north and south was Main street, near the lake; the next, Wisconsin street; and the next, Barnstable street, now called College avenue; the next, Chippewa street, now called Park avenue; the next, Villa street; the next, Campbell street, now called Grand avenue; and the next, Center street. The blocks were divided into lots as far west as Villa street, and as far south as Twelfth street; and the lots of the defendant were on the southeast corner, between Wisconsin street and Ninth street, running east and west. In 1845 this plat was resurveyed by the said Vilas, and the lots and streets in the vicinity of the lots in question remained unchanged; and Wisconsin street extended south to the section line, and the blocks not before divided were divided into lots. In 1849, after the state was admitted into the Union, in accordance with the Revised Statutes of 1849, page 763, section 5, the appraisers of school lands, whose duty it was to plat and appraise school lands, adopted this plat of 1842 as extended in 1845, and filed the same in the office of the secretary of state, as the plat of this fractional school section. On these plats the blocks are four hundred and eighty feet long north and south, and two hundred and forty feet wide east and west, divided into tiers of six lots each, eighty feet wide and one hundred and twenty feet deep, according to the certificate; but these measurements were not very accurate, and varied considerably, as might be expected in surveying through a heavily timbered and wild tract of land. Stone monuments were placed in many places, as required by the statute then in force, and probably many stakes were stuck, to indicate the fixed lines of the survey; and one stone monument was placed at the southeast corner of lot 12, block 29, which still remains as a fixed point for any ⁸⁴ subsequent surveys. The defendant, in 1848, owned the lot next north of his present lots 11 and 12, and he called upon the said Vilas, as a surveyor and the maker of the plat, to determine the west line of his lot on Wisconsin street. There were then fences all along for a considerable distance on the east side of that street north and south, and in front of his lot, and had been for several years. The said Vilas determined and indicated said fence at the southwest corner of lots 11 and 12, between Wisconsin street and Ninth street, as on the true line. The

present fence is on that line, and a fence in front of said lots has been on the same line since and before 1848. This old plat did service, and was the basis of all the local surveys of the lines of lots on streets between owners during the settlement and improvement of this part of the city of Racine, down to the year 1881, when the common council of said city adopted a new and arbitrary plan of a resurvey and replatting of this part of the city, and employed surveyors to do the work according to such plan. They fixed the line of Main street according to said stone monument, and then made all the other streets north and south agree with that line, making the streets sixty feet wide, and divided the distance between Main street and Villa street equally between the blocks, as also the distance between Villa street and Center street between the included blocks, dividing the surplus equally between the blocks. By this plan the lines of lots were materially changed, and the location of fences and buildings had to be materially changed to suit the new lines. Monuments were set at various points by this plan and resurvey in 1881, and in 1890 the city engineer, by the order of the common council, ran the lines of Wisconsin street according to said monuments and the newly-found distances, and found that the fence of the defendant was within that street, as above stated. On the ground of this new line so found this action is predicated.

⁸⁵ As early as 1844 the lots in this part of the city were occupied by lessees or purchasers, and fences were built along Wisconsin street according to stakes set to indicate the lines according to the old plat, and such fences, or many of them, still stand in the same places; and shade trees were set out, and buildings erected on or according to such lines. Immediately across Ninth street, south of defendant's lots, is the lot of Dr. Hoy; and next to his is the lot of I. H. Tinsler; and in 1846 a fence was built on the east side of Wisconsin street, in front of their lots and the next half lot south, so that there was about two hundred feet of continuous fence along that line, which was built according to stakes set at the corners of the blocks and lots by the said Vilas to indicate the true line according to his plat. In the next block south, Henry S. Durand owned the lots in 1849 or 1850, and found the fences built in front on Wisconsin street as old fences, and found the stakes at the corner of the lots according to which they were built; and they were then identified by the surveyor, Foster,

as the stakes set when the plat was made. The said Durand built his buildings, still standing, according to said line so determined; and said fences and buildings correspond with the fence in front of the defendant's lots. There was also a brick barn built by Mr. Case at an early day, north of these lots, whose water table corresponds with such line. Many survey stakes of the first plat were standing at the corners of the lots and blocks between 1842 and 1850, and then observed and since identified by several witnesses; and they stood on the line of said fences along Wisconsin street.

On these facts the circuit court found that the survey according to said plan of the city council of 1881 was a correct one, and should govern in determining the true east line of Wisconsin street, and held the defendant guilty of obstructing said street by said fence, and judgment was rendered against him for a fine of ten dollars and costs.

⁸⁶ The ruling question in this case is, where is the east line of Wisconsin street, in front of the lot in question, according to the Vilas plat of 1842? *Miner v. Brader*, 65 Wis. 537. It is not, where is such line according to any subsequent survey or plat? All resurveys or subsequent surveys are of no effect except to determine that question. A resurvey that changes lines and distances, and purports to correct inaccuracies or mistakes in the old plat, is not competent evidence in the case. There are only two questions: 1. Where is the true line fixed by the original plat? 2. Is the fence in question on that line? A resurvey that changes or corrects the old survey and plat can never determine the first question. A resurvey must agree with the old survey and plat to be of any use in determining it. The survey made on the arbitrary plan established by the common council in 1881 does not agree with the old plat in courses or distances, in the dimensions of block and lots, or in the lines of the streets. It seems to have been made to correct the old plat, to straighten the streets, and make a better plat than the old one. Resurveys for the lawful purpose of determining the lines of an old survey and plat are generally very unreliable as evidence of the true lines. The fact, generally known and quite apparent in the records of courts, is that two consecutive surveys by different surveyors seldom, if ever, agree; and the greater number of surveys, the greater number of differences and disagreements will occur. When two surveys disagree the correct one cannot be determined by still another survey. It follows

that resurveys are of very little use in such a case as this, except to confuse it. In *Miner v. Brader*, 65 Wis. 537, there were two surveys, and they disagreed; and the court had to resort to the evidence of a practical location of the lines by monuments. Monuments set by the original survey in the ground, and named or referred to in the plat, are the highest and best evidence. If there are none such, then stakes set by the ⁸⁷ surveyor to indicate corners of lots or blocks or the lines of streets at the time, or soon thereafter, are the next best evidence. The building of a fence or building according to such stakes, while they were present, become monuments after such stakes have been removed or disappeared, and the next best evidence of the true line.

This case does not differ materially from *Racine v. J. I. Case Plow Co.*, 56 Wis. 539; *State v. Schwin*, 65 Wis. 207; *Miner v. Brader*, 65 Wis. 537; *Koenigs v. Jung*, 73 Wis. 178, and some other cases in this court, and is ruled by them. The fence in front of this lot was evidently built according to stakes still standing, which were set by the surveyor Vilas; and this fence is on the line with two hundred feet of fence built according to the stakes then standing in the blocks on the south side of Ninth street, and fences and buildings in the next block south built according to stakes then standing by Mr. Durand, only three or four years after the plat was made. This fence also agrees with buildings on the north side of said lot, set according to the original survey. This testimony is almost as conclusive that this fence was built on the line of Wisconsin street as if the original stakes of the survey were still standing there to indicate it. When the testimony is undisputed that this defendant and several witnesses have been there present with these fences forty-five years, and that they have not been materially changed in their location during all that time, the above facts would seem to be the most conclusive evidence that those fences were built on the true line according to the original plat.

In the certificate to the old plat it is stated that a stone monument was set at the southeast corner of lot 12, block 29, in the northwest line of Main street, from which resurveys may be made; and stone monuments were also set at the northeast corner of each of the out lots, or undivided blocks, except those between Main street and the ⁸⁸ lake. All these stone monuments, except the first, are now absent. The line of Main street, determined by the first-named monument as a

base line for a resurvey, was used for the resurvey made in the plan of the city council of 1881. But it seems that, having thus determined the line of Main street, all the blocks between that street and Villa street were apportioned, and the blocks between Villa street and Center street were also apportioned, and the lines of the intervening streets were changed accordingly. Such a rule of apportionment may be adopted in a suit between lot owners, where all the private parties in interest are represented, and where the lots or blocks are less or more than the dimensions called for by the original plat. It is not presumed, in such a case, that there was a defective survey, but only an imperfect measurement of the whole line: *Pereles v. Magoon*, 78 Wis. 27; 23 Am. St. Rep. 389. To make this principle the basis of a resurvey of the whole plat would cast the lines of private lot owners into general conflict and confusion, and materially affect their rights of property which they had enjoyed for nearly half a century, without their knowledge or consent.

All the defendant needs to show is that the fence in question is on the line of Wisconsin street, according to the plat of 1842. That plat became a part of the deeds executed under and in reference to it: *Shufeldt v. Spaulding*, 37 Wis. 668. The defendant and others in the vicinity obtained their titles and went into possession, and made their improvements, set out shade trees, and built their buildings with reference to that plat, soon after it was made, and according to the stakes set out by the surveyor to mark the lines of that street then existing in many places. We are satisfied that the defendant resorted to the best evidence in existence of the true line of Wisconsin street in front of his lots. It is fortunate that this evidence is yet in existence. The time will soon come when it will have been ⁸⁹ lost by the destruction of all monuments, natural or artificial, and by the death of the old inhabitants. Then resort must be had to evidence of lesser degree to establish ancient boundaries, and long-continued occupation with respect to unchanged lines, and reputation, even, may be the best evidence available. In any case of disputed boundary the testimony, or even the acts, of the surveyor who originally established it, and who pointed out the stakes set by himself to mark the line so many years ago, accompanied by continued use and occupation in recognition of such line, is not only proper, but strong, evidence that such was the true line, and better evidence than a new survey made

more than forty years afterwards, which changes such line: *Koenigs v. Jung*, 73 Wis. 178. That case would seem to justify fully the testimony of Villas' statements, which were objected to by the respondent, in relation to his recognition of the stakes, and pointing out the true line in accordance with them. This line, so practically located, has become an ancient boundary, in favor of which the rules of evidence are, and should be, liberal.

There have been so many cases similar to this in this court, and all the various questions here involved have been so repeatedly settled, that it is supererogation to again repeat them. In addition to the above cases are the following: *Hrouska v. Janke*, 66 Wis. 252; *Vroman v. Dewey*, 23 Wis. 530; *Marsh v. Mitchell*, 25 Wis. 706; and *Nys v. Biemeret*, 44 Wis. 104; and many cases in other states are cited in the excellent brief of the learned counsel of the appellant which sustain the same principles. Such cases of the disturbance of the ancient lines and boundaries of streets, lots, and blocks in our cities and villages by arbitrary resurveys under the authority of their officers ought not to be encouraged. The public and private owners have acquiesced in the lines established by the first and original survey and plat, and by practical location and undisturbed ⁹⁰ possession for a great many years, and there does not seem to have been any necessity to disturb them at this late day.

By the COURT.—The judgment of the circuit court is reversed, and the cause remanded with direction to enter judgment in favor of the defendant.

WINSLOW, J., took no part.

BOUNDARIES.—EVIDENCE.—MONUMENTS AND NATURAL OBJECTS are paramount in establishing boundary lines, and courses and distances must yield thereto: *Riley v. Griffin*, 16 Ga. 141; 60 Am. Dec. 726, and note; *Doe v. Paine*, 4 Hawks, 64; 15 Am. Dec. 507; *Smith v. Stocomb*, 9 Gray, 36; 69 Am. Dec. 274, and note; *Richardson v. Chickering*, 41 N. H. 381; 77 Am. Dec. 769, and note; *Franklin v. Dorland*, 28 Cal. 175; 87 Am. Dec. 111; *Martin v. Carlin*, 19 Wis. 454; 88 Am. Dec. 696; *Crampton v. Prince*, 83 Ala. 246; 3 Am. St. Rep. 718; *Anderson v. McCormick*, 18 Or. 301; *Potts v. Canton etc. Warehouse Co.*, 70 Miss. 462; *West v. Bretelle*, 115 Mo. 653; *Ogilvie v. Copeland*, 145 Ill. 98; *Vandusen v. Shively*, 22 Or. 64; *Yanish v. Tarbox*, 49 Minn. 268. Calls in a survey for natural objects or marked lines and corners prevail over courses and distances: *Johnson v. Archibald*, 78 Tex. 96; 22 Am. St. Rep. 27, and extended note. Natural boundaries will prevail except when they are enveloped in doubt, in which case artificial marks, though of inferior degree, will have effect: *Felder v. Bonnett*, 2 McMull. 44; 37 Am.

Dec. 545, and note; note to *Bradford v. Hill*, 1 Am. Dec. 548. See, further, the note to *Wendell v. Jackson*, 22 Am. Dec. 642, and the extended note to *Heaton v. Hodges*, 30 Am. Dec. 737.

BOUNDARIES—CONFLICT BETWEEN SURVEYS—PRECEDENCE.—Ancient reputation and possession in respect to the location of streets, are entitled to more respect in determining the boundary to lots than any experimental survey that can now be made: *Ralston v. Miller*, 3 Rand. 44; 15 Am. Dec. 704, and note. A new survey will not prevail as to the location of quarter-section corners over the direct testimony of witnesses who saw corners located by the original survey: *Mills v. Penny*, 74 Iowa, 172; 7 Am. St. Rep. 474, and note. See, also, the extended note to *Johnson v. Archibald*, 22 Am. St. Rep. 34.

BOUNDARIES—TESTIMONY OF SURVEYOR.—The acts and declarations of the surveyor, while surveying an adjoining lot, are admissible on the question of boundary where he is dead and was not interested as owner in either lot at the time he made the declarations: *Adams v. Blodgett*, 47 N. H. 219; 90 Am. Dec. 569; extended note to *Putnam v. Fisher*, 36 Am. Rep. 749. A surveyor may be called as a witness in a case involving the location of a boundary line to state his knowledge of its true location as derived from his survey of the same, which he found to correspond with certain maps not offered in evidence: *Wineman v. Grummond*, 90 Mich. 280. See, also, *Heinlen v. Heilbron*, 97 Cal. 101.

STATE v. HORAN.

[85 WISCONSIN, 94.]

ELECTIONS.—BALLOTS DEPOSITED IN THE WRONG BOX by the mistake or fraud of the election inspectors are valid, and should be counted.

ELECTIONS—EVIDENCE.—A package of ballots shown to have been tampered with after the election is of no value as evidence.

ACTION to try title to the office of alderman as between Van Ryn and Horan under a municipal election. At the same time and place a judicial election for justice of the supreme court was held, and the ballots were placed in separate boxes as required by law. The return of the election inspectors gave Horan a majority of three votes, and he received a certificate of election and took possession of the office. The returns of the inspectors gave Van Ryn one hundred and thirty-one, and Horan one hundred and eighty-nine votes in the first election precinct, but it was shown that in counting the ballots in this precinct twelve judicial ballots were found in the municipal box, and the same number of municipal ballots were found in the judicial box, eleven of the latter having the name of Van Ryn, and one the name of Horan. These ballots were marked "disallowed" by the inspectors, and were not counted. Had they been counted, Van Ryn would have had

a majority. These ballots were presented in evidence, and a recount of all the municipal precincts was had in open court, showing a gain of six votes for Horan and a loss of three votes for Van Ryn, giving Horan a majority whether the judicial votes were counted or not. The jury found that the package of votes from the first precinct had been tampered with since the election and after they were sealed by the inspectors. The court found in accordance with the verdict of the jury, and also that the municipal votes found in the judicial box should be counted, and that Horan had received eleven hundred and thirty-one votes and Van Ryn eleven hundred and thirty-seven votes. Judgment for Van Ryn, and Horan appealed.

D. S. Ross and F. M. Hoyt, for the appellant.

Toohy, Doerfler and Gilmore, and W. C. Williams, for the respondent.

⁹⁵ WINSLOW, J. There is but one serious question in this case, and that is whether the municipal ballots found in the judicial box should be counted. The circuit court found, as the evidence abundantly showed, that these were ballots duly cast, but deposited by mistake, inadvertence, or otherwise, by the inspectors in the judicial box. The question is, shall the voters be deprived of their ballots by the mistake or fraud of the inspectors in so putting their ballots ⁹⁶ in the wrong box? This question must be answered in the negative. Judge McCrary well states the rule as follows: "It is a rule, well grounded in justice and reason, and well established by authority and precedent, that the voter shall not be deprived of his rights as an elector, either by fraud or the mistake of the election officers, if it is possible to prevent it": *American Law of Elections*, sec. 131. The authorities also support this position: *Parvin v. Wimberg*, 130 Ind. 561; 30 Am. St. Rep. 254; *People v. Bates*, 11 Mich. 362; 83 Am. Dec. 745. In this case it appeared that the number of judicial votes found in the municipal box was exactly the same as the number of municipal votes found in the judicial box, and that, if the judicial votes in the municipal box were added to the municipal votes found therein, the total number of votes substantially agreed with the poll list. The fact that they were legal votes put in the wrong box by fault of the inspectors was thus clearly demonstrated.

There was sufficient evidence also to sustain the verdict and finding that the package of ballots from the first precinct had been tampered with. This fact being proven, it became of no value as evidence: *American Law of Elections*, secs. 277, 278; *Albert v. Twohig*, 35 Neb. 563. No other questions requiring discussion are presented by the record. Under the proof and findings the relator was clearly entitled to judgment.

By the COURT. Judgment affirmed.

ELECTIONS.—BALLOTS PLACED IN THE WRONG BOX by mistake of an election officer must be counted: *Parvin v. Winberg*, 130 Ind. 561; 30 Am. St. Rep. 254.

ELECTIONS.—BALLOTS AS EVIDENCE.—Where ballots offered in evidence have not been kept in the custody of the proper officer, and have been left in an exposed and improper place, where there was an opportunity to tamper with them, they should not be received: *Hughes v. Holman*, 23 Or. 481; but if they have been safely kept, and protected from any tampering, they are admissible in evidence: *Hartman v. Young*, 17 Or. 150; 11 Am. St. Rep. 787, and extended note. See, further, the note to *Kreitz v. Behrensmeyer*, 8 Am. St. Rep. 377.

McMASTER v. SCRIVEN.

[85 WISCONSIN, 162.]

WILLS—ATTORNEY AS WITNESS TO—COMPETENCY TO TESTIFY.—An attorney who drafts a will, and signs it as a witness at the request of the testator, may testify to any matter in relation to the will and its execution of which he acquired knowledge by virtue of his professional relation.

WILLS—TESTAMENTARY CAPACITY—TEST OF.—To establish testamentary capacity, it is only necessary that the testator had sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who are, should, or may be the objects of his bounty, and the scope and bearing of his will. He must have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and to be able to form some rational judgment concerning them.

WILLS—UNDUE INFLUENCE—BURDEN OF PROOF—PRESUMPTION.—The fact that a childless widow bequeathes one-half of her estate to a nephew and niece, who resided with and cared for her during her last illness, while the remainder of her estate is divided among a large number of legatees, does not impose upon such nephew and niece the burden to prove the absence of fraud or undue influence, nor does their opportunity to exercise undue influence, coupled with the liberal provision in their favor, raise a presumption that the will was the result of such influence, especially when it is not shown that the provisions of the will

were not the free, uninfluenced result of the deliberate and intelligent judgment of the testatrix.

WILLS—UNDUE INFLUENCE—BURDEN OF PROOF—PRESUMPTION.—Undue influence in the execution of a will is never presumed. The burden of proof to show it is generally upon the contestant.

APPEAL from a judgment of the circuit court admitting to probate an instrument propounded as the last will of Susan R. Pitt, a childless widow, aged about sixty-three at the time of her death, which occurred about seven days after the will was executed.

Orton and Hughes, and O'Brien and O'Brien, for the appellant.

J. G. Wickhem, and Winans and Hyzer, for the respondent.

167 **PINNEY, J.** 1. The objection made to the reception in evidence of the instructions given by the testatrix to Mr. Wickhem, the attorney who prepared her will, and what took place between them on the subject of the will, is founded on the statute (Rev. Stats., sec. 4076) which provides **168** that "an attorney or counselor shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment." The testatrix requested Mr. Wickhem to sign the will which was the result of the communications between them, as a subscribing witness, and he signed it accordingly. This must be held to be a waiver of objection to his competency, so as to leave the witness free to perform the duties of the position, and to testify to any matter in relation to the will and its execution of which he acquired knowledge by virtue of his professional relation, including the mental condition of the testatrix at the time: *In re Will of Coleman*, 111 N. Y. 220; *Alberti v. New York etc. R. R. Co.*, 118 N. Y. 85. Some other objections were made to rulings upon questions of evidence; but none of them possess sufficient significance to require special notice.

2. Upon the question of the testamentary competency of the testatrix, the evidence, in our opinion, preponderates decidedly in favor of the proponent. There is no doubt she was racked and tortured with pain which it was extremely difficult to endure, and which had reduced her physical and mental vigor; but there is no evidence that her mind wandered in the least, or that her utterances were at any time in the least incoherent or irrational, or that she

labored under any mental delusion whatever. On the contrary, all that she is shown to have said or done at the time, and for a month or more before the execution of the will, indicates that, though at times irritable and excitable, yet her mental faculties, and her capacity to understand the situation and extent of her property, and to remember all who had natural claims on her bounty, and her ability to judge of the situation, and act intelligently in respect to it, still remained sufficiently clear and strong. The scheme of the will shows that it was a matter to which she must have ¹⁶⁹ given considerable thought, and although Emmett Scriven and Hattie, his wife, take under the will half, at least, of her estate, it is to be remembered that they came to her aid and support in her last illness, and that very many others of her kindred lived in other states, and some at a great distance. She had a right to make the discrimination, in this respect, she did, and, though it was argued that this fact and others already mentioned subject the will to some suspicion as to whether it was procured by undue influence, yet this fact alone, in its bearing on the question of her mental competency, is of little significance. If the testatrix was deficient in testamentary capacity, or the will was the result of undue influence on the part of the Scriven family, it is not reasonable, under the circumstances, to suppose that about one-half of the entire estate would have been given to thirteen other legatees. Quite a number of witnesses, particularly on the part of the proponent, expressed opinions unfavorable to her testamentary capacity, but the facts they state to justify their conclusions are few, and do not throw much light on the question. Mere opinion, without substantial grounds to justify it, is of comparatively little value. Several other witnesses, and among them her attending physician and Mr. Wickhem, who drew the will, give quite clear and convincing testimony, showing that she was fully competent to make a testamentary disposition of her property at the time she executed this will. We cannot say, under all the circumstances, that the will is open to objection as being a grossly unreasonable one. The test of testamentary capacity acted on in *Delafield v. Parish*, 25 N. Y. 9, has been adopted in this state, and applied in numerous cases, that "it is essential that the testator has sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who were or should or might have been the objects of his bounty,

and the scope and bearing of his will. He must ¹⁷⁰ have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and to be able to form some rational judgment concerning them": *In re Lewis' Will*, 51 Wis. 104, and cases there cited; *Will of Carroll*, 50 Wis. 437; *Will of Smith*, 52 Wis. 552 38 Am. Rep. 756; *In re Will of Blakely*, 48 Wis. 294. One error occurred in drafting the will, in stating the relationship of one of the legatees to the testatrix, but this was corrected at her suggestion, and it is said that Mrs. R. C. Peck, a sister of the deceased, and so described in the will, to whom five hundred dollars was given by it, was dead at the date of the will. The evidence is not entirely clear on the question, but, if so, there is nothing to show that she knew of the death of this sister when she made the will. These facts do not tend to show a want of testamentary capacity. As the circuit court heard the witnesses testify, and had opportunities for judging of their intelligence, fairness, and candor which we do not possess, we do not feel that we could interfere with the finding of that court, unless we are able to say that there is quite a preponderance of evidence against its conclusion. For reasons already stated, we think the evidence sustains the finding of the circuit court.

3. It was argued that, in consequence of the relations of Emmett Scriven and his wife to the testatrix, the burden of vindicating the will against the imputation that it was procured by fraud and undue influence was on them. They occupied her house, and were caring for her and nursing her in her illness, but we do not understand that by reason of these facts they stood in any fiduciary relation to the testatrix, within the meaning of the rule invoked by appellants, which would impose upon them the burden of showing an absence of fraud or undue influence in a will made by the testatrix containing substantial provisions in their ¹⁷¹ favor. Ordinarily, the proponent of a will "is not called upon to show affirmatively that there was no undue influence used to procure the making of the will. Undue influence is a defense, and the evidence of it must regularly come from the contestant": *Tyler v. Gardiner*, 35 N. Y. 559; *Boyse v. Rosborough*, 6 H. L. Cas. 2; *Clapp v. Fullerton*, 34 N. Y. 192; 90 Am. Dec. 681.

In *Boyse v. Rossborough*, the lord chancellor says: "One point, however, is beyond dispute, and that is that when once it has been proved that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it. Undue influence cannot be presumed." And this language is cited with approval and was acted on in *Armstrong v. Armstrong*, 63 Wis. 169. In the *Jackman Will case*, 26 Wis. 111, it was said that undue influence "cannot be presumed from conjecture or suspicion without reasonable and satisfactory proof of facts establishing the contrivance and undue influence. . . . It must be such an influence as to destroy the freedom of the testator's will, and thus render his act obviously more the offspring of the will of others than of his own. It must be an influence especially directed towards the object of procuring a will in favor of particular parties. . . . It must be such as was intended to mislead him to the extent of making a will essentially contrary to his duty; and it must have proved successful to some extent certainly," and "must be such as in some degree to destroy the free agency of the testator, and constrain him to do not only what is against his will, but what he is unable to refuse or too weak to resist." There must be proof that the act was obtained by importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear.

¹⁷² In this case it is contended that Scriven and his wife had the opportunity to exercise undue influence over the testatrix; that they had the temptation to exercise it; and because of the liberal provisions in the will in their favor it is to be presumed that it was the result of such influence acting on the mind of the testatrix, and this presumption must prevail unless rebutted. It may be conceded that there are circumstances in this case which beget suspicion, but the judgment of the court cannot go upon mere suspicion. The special circumstances in *Davis v. Dean*, 66 Wis. 108, 110, and *Will of Slinger*, 72 Wis. 27-33, clearly distinguished those cases from the present, and like the case of *Tyler v. Gardiner*, 35 N. Y. 559, show under what circumstances the burden of proof will be placed on the claimant under the will to show that the will was not the result of undue influence. It was there held that "when it appears from the proof that the will

was made by a testatrix on her deathbed; that her faculties were enfeebled by long and wasting disease; that she had been for a considerable period under the active and controlling influence of the principal beneficiary; that during this period she had been imbued with causeless antipathy to her only son, and had been induced to expel him from her house and to pursue him with unmerited accusations; that the will originated with the chief beneficiary, who framed the written instructions, engaged the counsel, and superintended its execution; that it involved a complete revolution of intention and an entire departure from previous testamentary dispositions; that it was made under mistaken impressions of fact recently imbibed and vitally affecting its provisions; these facts, coupled with gross inequality and apparent injustice, raise a presumption of undue influence, and cast the burden of proof of repelling it upon the party to whom it is imputed."

These cases have but a few features in common with the ¹⁷³ present case. There is nothing whatever to show that the Scriven family had any control or influence over the testatrix, or that they had tried to imbue her with prejudice against any of her relatives, or that the will originated with them, or either of them, or that they even knew what its provisions were, or were proposed to be, until after it was executed. The only thing that is shown is that Scriven employed for the testatrix Mr. Wickhem to prepare the will, but it does not appear that any member of the family was present when any of the instructions for it were given, much less that they, or either of them, made any suggestion as to its provisions, or any request of the testatrix. In short, there is nothing whatever showing, or tending to show, that all the provisions of the will were not the free, uninfluenced result of the deliberate and intelligent judgment of the testatrix. The facts shown by the contestant did not, in our judgment, change the burden of proof on the subject of undue influence, or establish it by a preponderance of evidence against that produced by the proponent. On this point, as well as on that of testamentary capacity, we think the evidence does not warrant a reversal of the findings of the circuit court.

The contest was originated and prosecuted in good faith by the contestant, and, in accordance with the settled rule of the court, he is to be allowed his taxable costs of the litigation to be paid out of the estate. The judgment of the circuit court must be affirmed.

By the COURT. The judgment of the circuit court is affirmed, the appellant's taxable costs to be paid out of the estate of the testatrix.

WILLS—ATTORNEY AS WITNESS TO.—After a testator's death, and when his will is presented for probate, his attorney who had drawn it should be allowed to testify as to the directions given him by the testator, so that it may appear whether the instrument presented for probate is, or is not, the will of the alleged testator: *Doherty v. O'Callaghan*, 157 Mass. 90; 34 Am. St. Rep. 258, and note.

WILLS.—The questions of what is sufficient capacity to execute a will, the test of and burden of proof concerning, as well as the various questions as to undue influence invalidating wills, are discussed in *Knox v. Knox*, 95 Ala. 495; 36 Am. St. Rep. 235; *Eastis v. Montgomery*, 95 Ala. 486; 36 Am. St. Rep. 227, and note; and the extended notes to *In re Hess' Will*, 31 Am. St. Rep. 670-691; *Richmond's Appeal*, 21 Am. St. Rep. 94-104; and *Small v. Small*, 16 Am. Dec. 262.

HAUSMANN v. CITY OF MADISON.

[85 WISCONSIN, 187.]

MUNICIPAL CORPORATIONS—LIABILITY FOR ICE ON SIDEWALK.—The presence of ice on sidewalks in a city, if produced by natural causes, such as drippings from snow or ice on adjacent buildings or the operation of the laws of gravitation and temperature, is not of itself such a defect in the sidewalk as makes the city liable for an injury to a person who slips and falls thereon, because of such accumulation of ice.

MUNICIPAL CORPORATIONS—ICE ON SIDEWALKS—CONTRIBUTORY NEGLIGENCE.—A person who, in passing along the street of a city in the daytime with nothing to divert his attention, and with knowledge of an accumulation of ice upon the sidewalk produced by natural causes and the laws of gravitation and temperature, slips and falls upon such ice when he can pass without coming in contact with it, is guilty of contributory negligence, and cannot recover from the city for his injury.

Bushnell, Rogers and Hall, for the appellant.

Burr W. Jones, for the respondent.

188 **ORTON, J.** This action is brought to recover damages for a personal injury to the plaintiff, caused by the defective condition and want of repair of a sidewalk of said city. At the close of the testimony for the plaintiff the circuit court granted a nonsuit on the motion of the defendant. The grounds of the motion were that there was no negligence on the part of the city shown, and that there was contributory negligence on the part of the plaintiff shown by the evidence. Of course, either one or the other of these grounds, sustained by clear and satisfactory testimony, would be sufficient to

justify the nonsuit. In an action for negligence a nonsuit is proper only when the inference of contributory negligence on the part of the plaintiff, or of the absence of negligence on the part of the defendant, is deducible from the undisputed facts and circumstances proved: *Hoye v. Chicago etc. Ry. Co.*, 62 Wis. 666. From the facts established by the indisputable evidence we are satisfied that under this rule the defendant, in respect to this ice on the walk, was not guilty of any ¹⁸⁹ culpable negligence, and that the plaintiff contributed to his own injury by his want of ordinary care.

Without detailing the testimony, the facts established by it appear to be as follows: On the twenty-sixth day of January, 1892, between nine and ten o'clock in the forenoon, the plaintiff, without any special business, and not hurried, was walking along the walk on South Blair street of the city, near the place of business of Warnes and Swenson, until he came to a place where there was ice a few feet wide on the walk, which was an inch or two thick where travelers walked and some thicker next to the adjacent building, and gradually ran out about the middle of the walk, or perhaps nearer the outside of the walk. It was nearly level, and was not piled up, except near the building. On this ice he slipped and fell, and broke his left arm. The ice at that place was caused by the melting of ice and snow on the roofs and in the gutters of that building, which was one story in front and two in the rear, during the day, and spattering down on the walk; and at night it froze up and made this patch of ice. This was usual in the winter, and there were other similar places on the walks, and from a similar cause. There was nothing in the construction of the building or in its condition upon which any culpable negligence of its owner or of the city could be predicated. The walk at that place had a slope lengthwise, according to the established grade of the street, and an inclination of a few inches towards the gutter, but only such as is common with all sidewalks properly constructed. From the description by the several witnesses of this ice it appears to have been formed by the melted snow and ice on the adjacent building, by the warmth of the day, spattered or sprinkled down on the walk next to the building, and towards night, and at night, by freezing as it fell, and making, naturally, thicker ice near the building, and, the water running off towards the gutter, the ice became thinner and ¹⁹⁰ thinner until it was

stopped running, by freezing near the middle of the walk. Its average thickness could not have exceeded an inch.

From this description any one may be reminded of many similar places on the walks in the winter. If it should be held that it was the duty of the city to remove the ice from all such places on the walks in the winter, it would be a duty of impossible performance, with all the manual labor and machinery within its command. The gutters and pipes of buildings are liable to freeze up in this latitude in the winter, and the melting snow and ice, caused by the heat of the sun in the daytime, will naturally and necessarily fall over the eaves and down on the walks, and run off into the gutters of the streets. At the freezing time of the evening it will be arrested in its flow, and congealed with the same descent or inclination of the walks—thicker where it falls, and growing thinner until it ceases to run, at this place about the middle of the walk. These conditions are produced by natural causes, or the operation of the laws of gravitation and temperature. Such places may be defects in the walks, but they are natural and common defects, for which the municipality is not responsible. They are unpreventable and irreparable. As said in *Taylor v. Yonkers*, 105 N. Y. 202, 59 Am. Rep. 492, a late case in New York: "It often happens that a fall of rain or the melting of adjoining snow is suddenly followed by a severe cold which covers every thing with a film or layer of ice, and makes the walks slippery and dangerous. This frozen surface is practically impossible to remove until a thaw comes which remedies the evil. The municipality is not negligent for awaiting the result." Our own cases are sufficient authority for holding that the presence of such ice on the walk is not a defect for which the city is liable: *Grossenbach v. Milwaukee*, 65 Wis. 31; 56 Am. Rep. 614; *Schroth v. Prescott*, 63 Wis. 652; *Cook v. Milwaukee*, 27 Wis. 192. The cases cited by the ¹⁹¹ learned counsel of the appellant are not applicable. There is no evidence that this ice was piled up so as to make it oval or uneven, except close to the building, where a pedestrian would not walk. I think we can say that there is no evidence whatever of the culpable negligence of the city for not preventing or removing this layer of ice on the walk. For that reason alone the trial court was warranted in granting the nonsuit.

On the other ground for the nonsuit—of the contributory negligence of the plaintiff—very little need be said, as the

evidence is very short and to the point. The plaintiff testified that at this time he was not employed, and was laying off and walking around. At this time he was on his way towards the depot, and was walking right along. He saw the walk ahead of him and looked at it. He was looking at the sidewalk straight ahead. His attention was not diverted, and he was not looking away. He could see that walk just as well as he could then see the floor (in the room where he was examined). He did not notice the ice on the walk. He resided in the same block where the ice was, and had passed the same place often before, and saw how the ice was formed by the water spattering down from the roofs, and had seen the ice there, and in several other places on that walk. From his own testimony there cannot be the least question but that the plaintiff slipped and fell on this ice through his own want of ordinary care. He knew all about it, and how it was formed, and passed the place nearly every day going to the depot to see the trains come in, and looked at the walk right ahead of him at this time, and it was daylight, so that he could see it. There was room on the walk where there was no ice for him to pass over if he chose to do so. He was grossly careless, or he would not have slipped down on this narrow patch of level ice. This conclusion is inevitable. He was well aware of all the danger there was in passing over this place,¹⁹² and took no precaution for his safety. The learned city attorney cites many cases of this court in his excellent brief, from *Achtenhagen v. Watertown*, 18 Wis. 331, 86 Am. Dec. 769, down to *Hopkins v. Rush River*, 70 Wis. 10, illustrative of such negligence. In *Schaeffer v. Sandusky*, 33 Ohio St. 246, 31 Am. Rep. 533, the court says, in a similar case: "If the snow and ice presented a dangerous obstruction," etc., "it must follow, since its nature and character were known to the plaintiff, that it was imprudence in him to venture upon it, or that, if it was prudent for him to pass over it, he did not exercise due care": To the same effect is *Wilson v. Charlestown*, 8 Allen, 137; 85 Am. Dec. 693. It is said in *Quincy v. Barker*, 81 Ill. 300, 25 Am. Rep. 278: "If it be conceded that the ice upon the sidewalk was an obstruction, it was a defect in the walk that could be readily detected. It was in the center of the walk, and in plain view, and could not escape the attention of a pedestrian unless he was walking in a hasty and reckless manner." There are many other cases cited in the brief of the learned counsel of the respondent to similar

effect. This appears to be one of the plainest cases of contributory negligence to be found in the books. There was an utter want of common care and prudence on the part of the plaintiff.

By the COURT. The judgment of the circuit court is affirmed.

MUNICIPAL CORPORATIONS—LIABILITY FOR ICE ON SIDEWALKS.—Mere slipperiness arising from a smooth surface of snow or ice on a sidewalk is not such a defect as will render a city liable for damages for injuries caused by a fall thereon: *Cook v. Milwaukee*, 24 Wis. 270; 1 Am. Rep. 183; *Chamberlain v. City of Oshkosh*, 84 Wis. 289; 36 Am. St. Rep. 928, and note with the cases collected.

WHITMORE v. HAY.

[85 WISCONSIN, 240.]

SPECIFIC PERFORMANCE—PAROL CONTRACT CONCERNING HOMESTEAD.—A parol contract that a son who is the grantee in a deed of a homestead conveyed by his father alone shall support his parents during their life, and at their death become the owner of the land in fee, if fully performed by such grantee, may be specifically enforced by him against the heirs at law of the grantor.

DEED OF HOMESTEAD—REFORMATION OF.—A son who accepts a deed of a homestead, signed by his father alone, by reason of erroneous advice that such deed would accomplish the intention of the parties, as contained in a parol contract, that the son should support his parents during their life, and after their death take the homestead in fee, is entitled after his parents' death to a reformation of the deed, as against the grantor's other heirs, so as to convey the entire estate to him in fee.

HOMESTEAD—SPECIFIC PERFORMANCE OF PAROL CONTRACT.—Though a deed of a homestead made by a father alone to his son is void, as a conveyance, yet if it is made in pursuance of a parol contract between the grantee and his parents, that they are to convey it to him in consideration of his supporting them during their lives, he is entitled to specific performance of the contract after their death, upon full performance on his part, and he is also entitled to have the deed reformed, so as to vest the whole title in him, as against the heirs of the grantor.

E. G. Comstock and Kate H. Pier, for the appellant.

Thomas M. Kearney, for the respondents.

246 CASSODAY, J. It appears from the record that Thomas Hay, Sr., had three children—Jane, Thomas, Jr., and the defendant, Joseph. Jane died in 1868, and before her father. She was the mother of the plaintiffs, and appears to have received a respectable advancement from her father. Thomas, Jr., is not a party to this action, and apparently makes no

claim to any portion of the property in question. On the contrary, he appears to have left home and reached the conclusion as early as September 19, 1877, not "to take any thing more from the old farm, unless in case of necessity"; and he then accordingly returned in a letter to his brother, the defendant, a note he held against him, and which he had received as a portion of his father's estate. This was manifestly done with the understanding alleged in the counterclaim, to the effect that the defendant should have the farm for taking care of his father and mother during their respective lives; for he said in the same letter: "Endeavor to save money, and make life as agreeable as possible, and be kind, patient, and forbearing to father and mother, as they used to be to you, and do all you can to make their last days happy. This I know you will do, and it is all I want." The defendant, Joseph, appears to have reached his majority in 1858 or 1859. Instead of leaving home, he remained with his father and mother, and worked on his father's farm, consisting of one hundred and twenty acres. In 1865, and when he was nearly twenty-eight years of age, he got married, and with his wife commenced living in an addition to their father's house, built for that purpose. Thereupon, he seems to have worked the farm under some parol agreement or understanding with his father, whereby each had a certain portion of the produce. In June, 1876, the father became sick, and continued to be sick and helpless most of the time up to his death, October 18, 1878. The mother was an invalid during the last ten or twelve years of her life. About the time the father so²⁴⁷ became sick, he appears to have reached the conclusion that he would make a final disposition of his property, or the most of it. Accordingly, he sold and conveyed twenty acres of the farm outside of the homestead to Meyer, as mentioned in the foregoing statement. In pursuance of the same purpose he drew the quitclaim deed from himself to the defendant for the conveyance of the balance of the farm, consisting of one hundred acres, including the homestead, at his home, June 17, 1876; and then, June 24, 1876, he and his wife and the defendant went to a notary public, some miles distant, in order that he and his wife might execute and acknowledge the deed, and have a contract drawn by the notary and executed by the defendant, binding him to care for and support his father and mother as long as they might respectively live. By the advice of the notary, to the effect that such purpose

could be better secured by omitting such written contract altogether, and by the father executing the deed alone, without the signature of his wife, such contract was omitted, and the father executed the deed alone, and delivered the same to the defendant, as mentioned in said statement.

The trial court held, in effect, that the deed, having been executed by the father alone, without the signature of his wife, was absolutely void as to the forty acres constituting the homestead, and hence that the plaintiffs, together, were entitled to recover one-third thereof in this action of ejectment.

The statute declares that "no mortgage or other alienation by a married man of his homestead, exempt by law from execution, shall be valid or of any effect as to such homestead, without the signature of his wife to the same": Rev. Stats., sec. 2203. Under this statute it has been held that where such deed is executed by the husband, and is signed by the wife, it is valid without her acknowledgment: *Godfrey v. Thornton*, 46 Wis. 677; *Allen v. Perry*, 56 Wis. 178. ²⁴⁸ The theory upon which the court so held is that the statute "does not vest any estate in the wife, living the husband, in the homestead, but operates only as a disability of the husband, living the wife, to alienate his homestead without her consent, evinced by her signature to his alienation." In *Ferguson v. Mason*, 60 Wis. 377, it was held that "a conveyance of a homestead, reserving to the grantor the sole, free, and absolute use and control thereof so long as he and his wife, or either of them, may live, conveys only a future estate, to be enjoyed after the homestead right shall cease, and is valid without the signature of the wife." In *Conrad v. Schwamb*, 53 Wis. 372, it was held that "a deed executed by husband and wife, which, though otherwise complete, fails through a misdescription to convey the land intended, being the grantor's homestead, must be treated as an executory contract by the husband to convey, which equity will enforce after the homestead right ceases against the husband or against his heirs after his death intestate, though not against the widow." That a deed based upon a good and valuable consideration, but defectively executed, may be treated in equity as an executory contract to convey, is abundantly established in that case and the authorities there cited by the present chief justice.

Our statutes provide that "when the owner of any homestead shall die, not having lawfully devised the same, such

homestead shall descend," etc., and that "every devise of land in any will shall be construed to convey all the estate of the devisor therein which he could lawfully devise," etc., and that "when any homestead shall have been disposed of by the last will and testament of the owner thereof, the devisee shall take the same free," etc.: Secs. 2271, 2278, 2280. Under these statutes and the decisions of this court, there can be no question but that the father had power, without the consent of his wife, to lawfully devise his homestead to the defendant: *Ferguson v. Mason*, ²⁴⁹ 60 Wis. 377; *Albright v. Albright*, 70 Wis. 535. It is equally clear that the father had power, without the consent of his wife, to convey his home to the defendant, reserving to himself the absolute use and control thereof so long as he and his wife, or either of them, might live. Had the parol understanding between the father and the defendant been reduced to writing, and executed by the father alone, with the requisite formalities, but without consideration, it probably might have been admitted to probate as a will, and vested the title in the defendant accordingly: *Wellborn v. Weaver*, 17 Ga. 267; 63 Am. Dec. 235; *Babb v. Harrison*, 9 Rich. Eq. 111; 70 Am. Dec. 203; *Burlington University v. Barrett*, 22 Iowa, 60; 92 Am. Dec. 376; *Carlton v. Cameron*, 54 Tex. 72; 38 Am. Rep. 620. See, also, cases cited in the notes to these several cases. The same would be the result, according to some of these cases, if the deed in question had been executed without consideration, but not delivered so as to take effect until the death of the father: See, also, *Turner v. Scott*, 51 Pa. St. 126; *Kelleher v. Kernan*, 60 Md. 440. But the deed in question was based upon a good and valuable consideration, consisting not only of services rendered and to be rendered, as agreed in the parol contract mentioned, but also in money; and upon the authorities cited and others to be cited, we are constrained to hold that the defendant is entitled to a specific performance of the same, as against the heirs at law of the grantor: *Thrall v. Thrall*, 60 Wis. 503; *Cable v. Cable*, 146 Pa. St. 451; *Book v. Book*, 104 Pa. St. 240; *Dreishach v. Serfass*, 126 Pa. St. 32. In this last case one by deed *inter partes*, in consideration of a nominal sum and covenants to be performed, conveyed land to another, the former reserving a residence and the latter covenanting to supply him with food, lodging, clothing, and all other necessities during his lifetime, to be charged upon the premises until the covenants were performed; and it was

250 held that such deed was not a testamentary instrument, because it contemplated an immediate possession taken by the grantee, nor was it an absolute conveyance to the grantee in fee, but merely an executory contract vesting an equitable estate in the grantee, the legal title remaining in the grantor during his lifetime. Of course, it follows that upon the performance by such grantee of all the covenants on his part he was entitled to a specific performance of such executory contract. In the case at bar the defendant fully performed the parol agreement on his part. The case, therefore, is very much stronger in favor of the defendant than *Jones v. Jones*, 6 Conn. 111, 16 Am. Dec. 35, which went to the extreme of holding that if a parent, in consideration of love and affection, makes a voluntary deed to his family by way of settlement, which is inoperative for want of delivery in his lifetime, equity will aid the grantees, and secure to them the legal title.

Thus far we have considered the question presented as though the defendant and his father were the only parties to the parol agreement. There is another view to be taken of this case, equally favorable to the defendant. The deed was, of course, void as a conveyance of the homestead, by reason of the failure of the wife to sign the same. As already indicated, by the oral agreement she was to sign the deed with her husband, and the defendant was to give the written contract for their maintenance and support, as mentioned. They all three went to the notary to have that purpose carried into execution. They were prevented from doing so by reason of the ill advice of the notary. By his advice, and through his influence and their own ignorance of the effect of the transaction, the wife refrained from signing the deed, and the defendant entirely omitted to give the written contract, because they were all induced to believe that they would better secure the purpose of the parol agreement by the father executing the deed alone and delivering **251** the same to the defendant. The facts seem to bring the case squarely within the well-established rule that courts of equity will interfere and grant equitable relief where, in making the contract, "the minds of the parties did not meet, or where in the case of a written contract they did not meet on the terms expressed in the writing, but did meet on other terms not there appearing." This rule is abundantly supported by the authorities cited by Mr. Melville M. Bigelow in an article entitled "Mistake of Law as a Ground of

Equitable Relief," in 1 Quarterly Law Review, 298. The proposition quoted has been sanctioned by this court, and fully considered upon reason and authority, English and American, in an opinion by Mr. Justice Orton in *Green Bay etc. Canal Co. v. Hewitt*, 62 Wis. 316. That case and that proposition were reaffirmed in *Silbar v. Ryder*, 63 Wis. 106, where it was held that "a lease which, by reason of the ignorance and mistake of the scrivener, fails to conform to the oral agreement made by the parties, will be reformed if the evidence clearly shows what that agreement was": See, also, *Lusted v. Chicago etc. Ry. Co.*, 71 Wis. 396; *Hagenah v. Geffert*, 73 Wis. 641.

Upon the whole case, we are forced to the conclusion that the defendant, upon his equitable counterclaim, is entitled to the relief demanded in his answer.

By the COURT. The judgment of the circuit court is reversed, and the cause remanded, with direction to enter judgment in favor of the defendant in accordance with this opinion.

SPECIFIC PERFORMANCE OF PAROL CONTRACTS TO CONVEY LAND.—Where either party has performed a valuable part of his parol contract for the sale and purchase of an estate, and is in no default for not performing the residue, he is entitled to a specific performance of the other part: *Hays v. Hall*, 4 Port. 374; 30 Am. Dec. 530; *Simmons v. Hill*, 4 Har. & McH. 252; 1 Am. Dec. 398; *Pugh v. Good*, 3 Watts & S. 56; 37 Am. Dec. 534, and note; *Wynn v. Garland*, 19 Ark. 23; 68 Am. Dec. 190, and note. A promise made by a father to a child to convey land to him if he will take possession and improve it, when followed by possession, and the expenditure of labor and money in improvements by the child, is for a valuable consideration, and will be enforced in a court of equity when clearly proved: *Langston v. Bates*, 84 Ill. 524; 25 Am. Rep. 466, and note; *Moore v. Pierson*, 6 Iowa, 279; 71 Am. Dec. 409, and note. But in *Foward v. Armstead*, 12 Ala. 124, 46 Am. Dec. 246, it was held that a promise by a father to give a plantation and slaves to his son if he would remove from another state to live, was a gratuity only, and could not be specifically enforced, although the son had been induced to break up at a loss, and been put to trouble and expense by the removal.

REFORMATION OF DEED FOR MISTAKE: See the note to *Kyle v. Fehley*, 29 Am. St. Rep. 869. Where, through mistake, a deed, made *bona fide* and for a valuable consideration, has been defectively executed, equity will decree that a new deed be executed: *Somerville v. Trueman*, 4 Har. & McH. 43; 1 Am. Dec. 389. A court of chancery will correct a mistake in a defective conveyance where it is clearly shown that by reason of the mistake the parties did not effect what they intended: *Beardsley v. Knight*, 10 Vt. 185; 33 Am. Dec. 193, and note; *Stone v. Hale*, 17 Ala. 557; 52 Am. Dec. 185, and note.

FAWCETT v. FAWCETT.

[85 WISCONSIN, 832.]

HUSBAND AND WIFE—RESULTING TRUST—LACHES.—A wife whose husband purchases land with her money and takes the title in his name without her knowledge or consent, and who resides on the land with him, occupying it as their homestead until his death some twenty years after she knows that the title was taken in his name, but without his ever asserting any hostile right in the land, and with his constantly admitting her equitable right thereto, is not guilty of laches so as to defeat her action brought against her husband's heirs soon after his death to enforce a resulting trust in her favor in such land.

HUSBAND AND WIFE—RESULTING TRUST—LIMITATIONS.—A resulting trust in favor of a wife arising from her husband's purchasing land with her money, and taking the title in his name without her knowledge, is not barred by the statute of limitations in favor of his heirs who have no equities superior to his when he, while living, always confessed the trust and never had, or claimed, any adverse possession to the land.

TRUSTS—STATUTE OF LIMITATIONS.—As long as there is a continuing and subsisting equitable trust acknowledged or acted upon by the parties, the statute of limitations does not apply, but if the trustee denies the right of his *cestui que trust*, and the possession becomes adverse, lapse or time from that period may constitute a bar in equity. Trusts which are the ground of an action at law are not exempted from the operation of the statute.

TRUSTS.—STATUTE OF LIMITATIONS does not begin to run against a *cestui que trust* in possession until the date of his ouster, no matter what the nature of the trust may be.

HUSBAND AND WIFE.—STATUTE OF LIMITATIONS does not run against claims between husband and wife.

ACTION by a widow to enforce a resulting trust in her favor in land purchased by her husband in his lifetime with her money, the title thereto being taken in his name without her knowledge or consent. He died in 1890, leaving a will, by which he bequeathed the land in dispute, together with other property, to his widow and lawful heirs. This action was commenced in 1890 against such heirs. The trial court sustained a demurrer to the complaint on the ground that the action was barred by the statute of limitations. Judgment for defendants and plaintiff appealed.

Bushnell and Watkins, for the appellant.

Clark and Taylor, for the respondents.

335 LYON, C. J. There can be no doubt the complaint states facts sufficient to show that the plaintiff is entitled to enforce a resulting trust in the land in controversy; that is to say, she is entitled to have vested in her the absolute title to such land, unless she is excluded from such relief by the

statutes of limitation or by her laches in the enforcement of her right. Before the enactment of our statute of uses and trusts, she would have been entitled to assert and enforce such trust, even though she consented that the land for which she paid should be conveyed to her husband, or had she personally taken the conveyance thereof in his name. In such cases, however, the statute abolishes the trust except as to creditors of the person paying for the land, but saves it to such person, where, as in this case, the grantee named in the conveyance took it as an absolute conveyance in his own name without the knowledge or consent of the person paying the consideration, unless a *bona fide* purchaser has intervened: Rev. Stats., secs. 2077-2088. If this action is not barred by some statute of limitation, we do not think, under the circumstances of the case disclosed in the complaint, that laches should be imputed to the plaintiff to defeat it. Although during more than twenty years before her husband died she knew he had taken the conveyance in his own name, yet she was residing with him upon the land, using it as the family homestead, and, so far as it appears, he recognized and admitted ³³⁶ her right to the land, and asserted no interest in or claim to it hostile to her absolute ownership thereof, and the rights of no other person have intervened to render it inequitable to enforce the trust in her favor. The heirs of her husband (the defendants) have no greater equities against the enforcement of the trust than her husband would have had if the action to enforce it had been commenced against him in his lifetime. Under these circumstances, it should not be held that she ought to have endangered the peace and comfort of the family—perhaps the very existence of their home—by engaging in a lawsuit with her husband over the title to the land in question, and that her right thereto is defeated because she did not do so. Courts of equity do not impute laches by any iron rule, but allow circumstances to govern their decision in every case. And it is said: "Where the obligation is clear, and its essential character has not been affected by the lapse of time, equity will enforce a claim of long standing as readily as one of recent origin; certainly, as between the immediate parties to the transaction": 13 Am. & Eng. Ency. of Law, 674; *United States v. Alexandria*, 19 Fed. Rep. 609, and cases cited. The controlling question in the case is, therefore, does any statute of limitation bar the plaintiff's right to maintain this action?

It is now thoroughly well settled, by authorities too uniform to require citation and too numerous to cite here, that as between a trustee of an express trust cognizable only in a court of equity, and his *cestui que trust*, concerning matters connected with the trust relation, no statute of limitation, nor any bar by analogy thereto, can be relied upon to defeat the execution of the trust, unless the full period of limitation has elapsed since the denial or repudiation by the trustee of the trust obligation. If any one desires to consult the cases holding this doctrine, he will find many of them cited in the volume of the encyclopædia of law above ³³⁷ cited, in note 4, on page 683. The reason and grounds of the above rule are thus stated by Mr. Justice Gray in *Speidel v. Henrici*, 120 U. S. 377, 386: "Express trusts are not within the statute of limitations, because the possession of the trustee is presumed to be the possession of the *cestui que trust*." Hence it would seem that in order to set the statute running against such trust a surrender of the trust property is essential, because without such surrender there can be no effectual repudiation of the trust.

It is freely conceded that there are many authorities which, in general terms, assert the rule that the statute of limitations runs against all implied, resulting, or constructive trusts. But it is apprehended that the court would fall into serious error were it to accept and apply that rule without qualification to all cases involving the enforcement of such trusts. The trust here sought to be enforced is not an express, but a resulting, trust. Yet it is enforceable only in equity, and the alleged trustee (plaintiff's husband) from the inception of the trust until he died freely admitted, and never denied, the trust claimed, and never had any adverse possession of the property; for he and his wife always occupied it jointly as their homestead, and it does not appear that he ever asserted any interest in, or exercised any control of, the land hostile to the trust here sought to be enforced.

Thus we find in this resulting trust every element which operates to take an express trust out of the statutes of limitation, and prevents the statute from running against it until after the trust has been effectually repudiated. Under these circumstances it would be illogical to hold the resulting trust within the statute, and the express trust not within it. We do not believe the law makes any such imaginary distinction.

In the leading case of *Kane v. Bloodgood*, 7 Johns. Ch. 90,

11 Am. Dec. 417, decided by Chancellor Kent in 1823, no distinction ³³⁸ seems to have been made between express trusts and any other kind of trusts, in respect to the effect of statutes of limitation upon them. Whether, in any given case, the trust was or was not affected by those statutes, was made to depend entirely upon the presence or absence of the qualities and elements above mentioned. The doctrine of the case seems to be correctly stated in a headnote as follows: "Those trusts which are mere creatures of a court of equity, and not within the cognizance of a court of law, are not within the statute of limitations. As long as there is a continuing and subsisting trust, acknowledged or acted on by the parties, the statute does not apply; but if the trustee denies the right of his *cestui que trust*, and the possession of the property becomes adverse, lapse of time from that period may constitute a bar in equity; but other trusts, which are the ground of an action at law, are not exempted from the operation of the statute." To the same effect are the cases of *Elmendorf v. Taylor*, 10 Wheat. 152; *Dow v. Jewell*, 18 N. H. 340; 45 Am. Dec. 371; *Taylor v. Holmes* (N. C.), 14 Fed. Rep. 498, 508; *Springer v. Springer*, 114 Ill. 550; *Reynolds v. Sumner*, 126 Ill. 58; 9 Am. St. Rep. 523; *Otto v. Schlapkahl*, 57 Iowa, 226, 230; *Gebhard v. Sattler*, 40 Iowa, 152; *Lakin v. Sierra B. G. M. Co.* (Cal.), 25 Fed. Rep. 337, 347. In the case last cited Judge Sawyer said: "Upon well-settled principles of law the statute [of limitations] does not begin to run against a *cestui que trust* in possession until the date of his ouster therefrom, no matter whether the trust be express or implied: *Love v. Watkins*, 40 Cal. 569; 6 Am. Rep. 624; *McCauley v. Harvey*, 49 Cal. 497; *Altschul v. Polack*, 55 Cal. 633." In *Howell v. Howell*, 15 Wis. 55, Chief Justice Dixon said of the claim that the statute of limitations does not commence to run until the trust is denied, that the doctrine was applicable only to express or acknowledged trusts. This remark evidently implies that the chief justice was of the opinion that an acknowledged trust, though not an express ³³⁹ one, is on the same footing in respect to the statute as an express trust, upon which, as we have seen, the statute does not commence to run until the trust is denied and repudiated. Much doctrine will be found laid down in the text-books and in many other adjudications in the same direction, but the view we have taken of the question involved seems so well grounded in principle that we do not care to further comment upon or cite the authorities.

We hold, therefore, that because it appears from the complaint that the trust in question is cognizable only by a court of equity, because the trustee always confessed the trust, because he never had any adverse possession of the trust property, and because his heirs have no equities superior to those of the trustee when living, the complaint does not show that any statute of limitation has run against the cause of action therein stated.

We thus reach the conclusion that the complaint states a valid, subsisting cause of action in favor of plaintiff against defendants, without resorting to the rule stated in *Second Nat. Bank v. Merrill*, 81 Wis. 151, 29 Am. St. Rep. 877, to the effect that statutes of limitation do not run against claims between husband and wife. For authorities to that proposition, in addition to those cited in the opinion of Mr. Justice Orton, see cases cited in 13 American and English Encyclopædia of Law, page 711, note 3.

By the COURT. The order of the circuit court sustaining the demurrer to the complaint is reversed, and the cause will be remanded, with directions to overrule such demurrer.

HUSBAND AND WIFE—PURCHASE BY HUSBAND WITH WIFE'S MONEY—RESULTING TRUST.—A purchase of land by a husband with the money of his wife, taking the title thereto in his own name, creates a resulting trust in favor of the wife: *Grantham v. Grantham*, 34 S. C. 504; 27 Am. St. Rep. 839, and note with the cases collected.

LIMITATIONS OF ACTIONS IN CASES INVOLVING TRUSTS.—The trusts against which the statute of limitations does not run are those technical and continuing trusts not cognizable at law, and falling within the peculiar and exclusive jurisdiction of equity: *Landis v. Saxton*, 105 Mo. 486; 24 Am. St. Rep. 403, and note. The statute of limitations does not begin to run in cases of express trusts until a repudiation of the trust: *Fox v. Tay*, 89 Cal. 339; 23 Am. St. Rep. 474, and note with the cases collected; note to *Reynolds v. Sumner*, 9 Am. St. Rep. 531; and the extended note to *Miles v. Thorne*, 99 Am. Dec. 393.

LIMITATIONS OF ACTIONS IN CLAIMS BETWEEN HUSBAND AND WIFE: See *Second Nat. Bank v. Merrill*, 81 Wis. 151; 29 Am. St. Rep. 877; *Manchester v. Tibbetts*, 121 N. Y. 219; 18 Am. St. Rep. 816, and note; and *Johnson v. Edwards*, 109 N. C. 466; 26 Am. St. Rep. 580, and note.

MAYERS v. KAISER.

[85 WISCONSIN, 382.]

HUSBAND AND WIFE—WIFE'S RIGHT TO RECOVER MONEY LOANED TO HUSBAND.—A wife who has made a *bona fide* loan of her money to her husband shortly before his failure in business, is entitled to the same protection out of his assets as are his other creditors.

HUSBAND AND WIFE—FRAUDULENT CONVEYANCES—EMPLOYMENT OF HUSBAND BY WIFE.—A wife has a right to employ her husband as her agent to assist her in managing her separate property or business without subjecting it to the claims of his creditors, and the fact that he devotes his time, labor, and skill to the management of such business for a fixed compensation paid by her does not subject the profits of the business or the property accumulated thereby to the claims of his creditors.

ACTION by Mayers, as receiver of the property of M. Kaiser, on behalf of one of his creditors, to reach certain real estate, the legal title to which is vested in Jennie Kaiser, his wife, and purchased by her with the proceeds of her separate business carried on in her name. The object of the action is to subject such real estate, as well as the stock of goods employed in such business, to the payment of the claim of such creditor. Said Kaiser failed in business, and at the time of his failure was indebted to his said wife, Jennie, for money borrowed from her shortly before such failure. She, in conjunction with other of his creditors, obtained judgment against him, and his stock of goods was sold upon executions issued on such judgments to his wife and two other of his creditors, who continued the business, employing Kaiser as a clerk. Mrs. Kaiser afterwards bought out the other two creditors, and continued the business in her name, employing her husband to act as her manager at a salary of five dollars per week, they and their family being supported out of the profits of the business. Some years later Mrs. Kaiser sold out the business to her sons and son-in-law, and invested the proceeds in the real estate forming the subject matter of the present action. Judgment dismissing the action, and the receiver appealed.

Bashford, O'Connor and Polleys, for the appellant.

Bushnell, Rogers and Hall, for the respondents.

391 PINNEY, J. 1. The evidence shows that the judgments upon which the stock of Mayer Kaiser, the judgment debtor, was sold out in Chicago in October, 1883, were for honest debts which he then owed; and there is nothing in the evi-

dence, so far as we are able to see, to show that there was any thing improper or unfair in the manner in ³⁹² which the title to the stock purchased became vested in Mrs. Kaiser, Simon Wolf, and Altheimer, October 15, 1883, or in the agreement which they made for its management and sale by Wolf and Mrs. Kaiser for the benefit of the purchasers. The agreement of that date is a plain and reasonable business arrangement, and the facts which it recites are sustained by the evidence. There is nothing to show that the husband and judgment debtor had or used any funds or means of his own to enable his wife ultimately to become the sole owner of the business conducted at "The Fair," established in the first instance by Wolf and Mrs. Kaiser under said agreement. The note for fifteen hundred dollars, upon which the judgment against Kaiser in favor of his wife was rendered, was given for money which she testifies she loaned her husband, and the greater part of it but a short time before his failure; and his testimony tends to show that the money was loaned and was not a gift. There is no evidence to the contrary, and the finding of the circuit court that it was a loan is sustained, we think, by the evidence. If the money was a *bona fide* loan, and not a gift, there is no reason why the wife should not be protected in like manner as other creditors. She purchased Wolf's interest, and made full payment therefor, December 29, 1884, and bought out and paid Altheimer for his interest. Mrs. Kaiser's husband, the judgment debtor, was employed in the mean time in the business, at twenty-five dollars per week; and he managed the business, and rendered his personal services, which were thereafter continued at the rate of five dollars per week. It seems clear that the title to the goods and business was, until the sale thereof, February 15, 1892, to her codefendants, her sons and son-in-law, in Mrs. Kaiser, and there is no reason whatever for questioning its validity as to her husband's creditors, unless the fact that he gave his personal time, attention, and services to the management and conduct of the business for about nine years is ground for ³⁹³ impeaching her title, as being for that reason fraudulent as against his creditors, and who were such at the time of the execution sales in October, 1883. It may be conceded that there are some statements in the testimony of the judgment debtor calculated to create suspicion, and particularly in respect to the extent of the business, amount of profits, and value of the stock; but these

appear, upon the whole, to have been grossly exaggerated. The circuit court found that the sale of the stock of February 15, 1892, was for its fair value, and the real estate, the home of the family, appears to be encumbered. While the court should carefully scrutinize all cases of alleged fraud against creditors, wherein members of the family of the debtor make claim to important or valuable interests as against creditors, yet judgment cannot go upon mere suspicion. Fraud cannot be presumed, and the burden of showing it is on him who alleges it.

2. As the business established at Madison in the Fair store was the business of Mrs. Kaiser, as against her husband's creditors, she might lawfully employ her husband, with or without hire, to manage it and assist her in carrying it on. The evidence does not sustain, we think, the charge that what he did in this respect was in pursuance of any plan or scheme to defraud his creditors. The business was not only her own, and transacted in all respects in her own name, but it does not appear that any claim was ever made to the contrary until this proceeding was instituted, nor that she ever made any concession, or her husband any claim, to the contrary, or that he has, during a period of eight or nine years, used any of the proceeds beyond his five dollars per week as his own, or claimed the right to do so. We are unable to say that his employment and management of the business was not in good faith, or that it shows that he was the real owner, and the title of his wife was merely nominal or colorable. Mrs. Kaiser ³⁹⁴ had a right to deal with her separate property in all respects as a *feme sole*, and had a right to employ agents to assist her in managing her property and carrying on her business; and she had a right to employ or avail herself of the services of her husband without subjecting her separate estate to the claims of his creditors. "With respect to her separate property, the statute has placed her upon the same footing as to all the world, her husband included, as if she were, in the words of the statute, 'a single female': *Beard v. Dedolph*, 29 Wis. 140. But she may not enter into partnership with him: *Fuller v. McHenry*, 83 Wis. 573. "As a negotiation or dealing, therefore, with respect to her separate estate, the transaction is to be looked upon as if the debtor was not her husband, but a stranger. The marriage relation is to be disregarded, except where the question of fraud arises; and there it will be considered, and the transaction more closely scrutin-

ized, on account of the greater inducements offered and facilities afforded for the commission of fraud": *Beard v. Dedolph*, 29 Wis. 140; *Hoxie v. Price*, 31 Wis. 82; *Abbey v. Deyo*, 44 N. Y. 348; *Gage v. Dauchy*, 34 N. Y. 297.

3. The proposition most strongly pressed at the argument was that the creditors of Kaiser, the husband, were entitled to receive payment of their claims out of the property accumulated, beyond the present needs of his family, by his skill, industry, and ability in managing and conducting the business of "The Fair" as the agent of his wife; and the cases of *Glidden v. Taylor*, 16 Ohio St. 509, 91 Am. Dec. 98, and *Feller v. Alden*, 23 Wis. 301, 99 Am. Dec. 173, among others, were cited in support of the position. This contention is contrary to the case of *Dayton v. Walsh*, 47 Wis. 113, 32 Am. Rep. 757, wherein it was held that where a married woman, having at the time no separate estate, purchased a farm of a stranger entirely upon credit, giving her notes for the price, secured by a mortgage on the property, and her husband lived with her on ³⁹⁵ the farm and controlled the farm labor, carrying on the business in her name and as her agent, without any agreement as to his compensation for such services, the purchase by her having been made in good faith, and not as a means of fraudulently placing the husband's property beyond the reach of his creditors, the crops raised on the farm by their joint labor and management belonged to the wife, and that they were not subject to sale for the husband's debts. This conclusion was considered to be in accordance with the case of *Feller v. Alden*, 23 Wis. 301, 99 Am. Dec. 173, relied on by the appellant. In *Feller v. Alden*, 23 Wis. 301, 99 Am. Dec. 173, it was held that where the wife owned land as her separate estate she might cultivate it by means of the labor of her husband and their minor children, and that the legal title to the products and proceeds would be in her, so that they could not be levied upon under an execution against her husband; that the mere fact that the wife employed the husband's services in cultivating her land was not proof of an attempt to defraud his creditors. It was questioned in that case, upon the authority of *Glidden v. Taylor*, 16 Ohio St. 509, 91 Am. Dec. 98, whether a court of equity, upon a proper application of the husband's creditors, would not make an apportionment of the products, as between the fair rent and use of the capital of the wife and the value of the

personal services of the husband, so as to give the creditors the benefit of his industry, but the question was not decided. The case of *Glidden v. Taylor*, 16 Ohio St. 509, 91 Am. Dec. 98, is materially different from this case, in respect to the fact that in this the husband had a compensation for his services, and none of his property was used in the business, and none of the profits applied to his use. *Penn v. Whitehead*, 17 Gratt. 503, 94 Am. Dec. 478, seems to hold that in such a case as *Glidden v. Taylor*, 16 Ohio St. 509, 91 Am. Dec. 98, the wife would not be entitled to any share of the profits. It is stated in some of the text-books, and held by many well-considered cases, that the time, talents, and industry of a debtor are at his own disposal, and that his creditors ³⁹⁶ have no claim thereto; that he may bestow them gratuitously upon whom he will, and upon his wife as well as another, and that he cannot be compelled to labor for the benefit or advantage of his creditors; that while the law does not require the wife to support the husband, it does not prohibit her from using her own means for that purpose or for the support of his children: 2 Bishop on Married Women, sec. 453; Kelly on Contracts of Married Women, 149; *Abbey v. Deyo*, 44 N. Y. 344; *Gage v. Dauchy*, 34 N. Y. 293; *Buckley v. Wells*, 33 N. Y. 518; *Foster v. Persch*, 68 N. Y. 400; *Third Nat. Bank v. Guenther*, 123 N. Y. 568; 20 Am. St. Rep. 780. In *Spering v. Laughlin*, 113 Pa. St. 209, 213, it was held that, if a married woman's separate right to property is found to exist, her husband may not only act as her agent, but he has the legal right to give his wife his labor and skill in conducting her business, and his creditors cannot sell her property, produced by his labor and skill with her original property: *Baxter v. Maxwell*, 115 Pa. St. 469. The entire question in all such cases would seem to be whether the property and business in question is really that of the wife, or whether it is that of the husband, and her claim to it a mere cover to protect it from his creditors. We are unable to understand how the husband's creditors can be said to be defrauded, when they cannot compel him to labor for their benefit, if he voluntarily bestows on others, or on his wife, that which under the law they cannot reach for the satisfaction of their demands. The cases of *Wortman v. Price*, 47 Ill. 22, and *Wilson v. Loomis*, 55 Ill. 352, while differing in some respects from the present, are not in accord with our own cases or those cited above; and *Hallowell v. Horter*, 35 Pa. St. 375, was a case of confusion

of property, and the whole was held liable for the husband's debts. The cases that hold or intimate an opinion that in a court of equity an apportionment of profits or division of property may be had at the suit of the husband's creditors, will be found to rest ³⁹⁷ upon the ground of community or blending of the money or property of the husband, as well as his labor, with the property of the wife in some business venture or enterprise in which there is a common participation in, or use of, the profits; and we have met with no case in which the bare fact that the time, skill, and labor of the husband devoted to the business of the wife has been held to give rise to such an equity. It is difficult to see how such an equity could arise where the husband has already been paid for his services, as agreed, by the wife. We think that the plaintiff's contention in this respect cannot be sustained.

We think that the evidence sustains the findings of the circuit court, and it is therefore not necessary to consider the question whether the action was barred by the statute of limitations, or by laches on the part of the creditor instituting the action. We do not find any error in the record.

By the COURT. The judgment of the circuit court is affirmed.

HUSBAND AND WIFE—LOANS FROM WIFE TO HUSBAND.—Where a husband receives from his wife money which is hers, and uses it in his business, there is an implied promise that he will repay her, and as between them a valid indebtedness is created. A transfer of property by him to her in payment of such a debt without fraud on the wife's part will be upheld: *Riley v. Vaughan*, 116 Mo. 169; 38 Am. St. Rep. 587, and note with the cases collected.

HUSBAND AND WIFE—RIGHT OF WIFE TO EMPLOY HUSBAND AS AGENT. A married woman who is possessed of a separate estate and is engaged in conducting a separate business, may employ her husband as her agent to carry on such business, and has the right to compensate him for such services: *Third Nat. Bank v. Guenther*, 123 N. Y. 568; 20 Am. St. Rep. 780, and note. The cases on this subject will be found collected in the notes to *Hoffman v. McFadden*, 35 Am. St. Rep. 105, and *Wells v. Batts*, 34 Am. St. Rep. 512.

FRENCH v. STATE.

[85 WISCONSIN, 400.]

CONSTITUTIONAL LAW—RIGHT TO TRIAL BY IMPARTIAL JURY.—A person accused of crime, who is compelled to be tried on his plea of not guilty before the same jury that has heard and considered the evidence on his special plea of insanity, and has disagreed, and been discharged from further consideration of such special plea, is thereby deprived of his constitutional right to trial by an impartial jury.

JURORS—QUALIFICATIONS OF.—Jurymen who have disagreed as to the insanity of a person accused of crime, when such issue was submitted to them, are disqualified from sitting on a jury to try the accused under his plea of not guilty.

CRIMINAL LAW—RIGHT OF ACCUSED TO BE PRESENT ON HIS TRIAL.—The failure of the record to show that a person accused of crime was present in court when the verdict of guilty was rendered against him, or that he was present when sentence was pronounced against him, or immediately before, or that he was asked by the court if he had any thing to say why he should not be sentenced, is fatal to the verdict and judgment thereon.

CRIMINAL LAW—RIGHT OF ACCUSED TO BE PRESENT.—PRESUMPTION is not indulged that a person accused of crime was present during his trial and sentence, if the record fails to show it.

G. F. Merrill and Charles N. Gregory, for the appellant.

J. M. Clancey, assistant attorney general, for the state.

405 ORTON, J. The plaintiff in error was tried, convicted, and sentenced for the murder of Gavin M. Steel, on the fifth day of March, 1891. A motion in arrest of judgment and a motion for a new trial were overruled. The case comes before this court on writ of error; and a great many errors are assigned for the reversal of the judgment. The first two errors assigned and urged by the learned counsel of the plaintiff in error appear by the record, and are of the gravest importance and material, and in our opinion are fatal to the conviction. It is necessary to consider only these, as a new trial must be had in the case; and the other errors assigned, of less importance and not so clearly apparent, may not again occur.

1. The prisoner was compelled to be tried before the same jury that had heard and considered the evidence on the special issue of insanity, and had been unable to agree, and had been discharged from further consideration **406** of such special issue as such. The provisions of the Revised Statutes on this subject were such that, if the jury impaneled to try such special issue of insanity failed to agree, the court could

discharge them, and impanel another jury to try the same, and so on until there should be an agreement and verdict as in other cases. To remedy what was supposed to be an omission or defect, chapter 164 of the laws of 1883 was enacted, as follows: "If the jury shall be unable to agree upon a verdict on the trial of such special issue, the court shall for that reason discharge them from the further consideration of such special issue as such, and, unless such special plea be withdrawn by such accused person, or counsel in his behalf, the court shall forthwith order the trial upon the plea of not guilty to proceed, and the question of insanity involved in such special issue shall be tried and determined by the jury with the plea of not guilty." Under this provision the circuit court, when the jury impaneled to try such special issue of the insanity of the accused when he did the killing, were unable to agree upon a verdict, ordered the trial upon the plea of not guilty to proceed before the same jury.

This was a very grave error. The statute does not so provide. If it did, its constitutionality would be at least questionable. The court should "forthwith order the trial upon the plea of not guilty to proceed" before another jury, to be selected, impaneled, and sworn to try the case. This is consistent with the act and the prisoner's rights. This jury had heard all the evidence and arguments, as well as the instructions of the court on the issue of insanity, the question on which the guilt or innocence of the accused depended, and had deliberated upon it sufficiently to know that they were unable to agree, and had disagreed. The very fact of their disagreement implies that they had all formed opinions on it, and that their opinions did not agree. Part of the jury had formed an opinion that the ⁴⁰⁷ accused was insane, and part that he was not. It is said, although it is not material, that the jury stood ten one way and two the other way. The same issue of the insanity of the accused was still undetermined, and had to be tried again with his plea of not guilty. He had the undoubted right to have that question, as well as all others involved in his plea of not guilty, tried by an impartial jury.

The case stood precisely as it would if these statutes in relation to a special issue of insanity had not been enacted. The accused is placed on trial for the crime. His insanity is a question material to the case. A jury is forced upon him to try his case, all of whom had formed and expressed an

opinion on the question whether he was or was not insane when he killed the deceased. Does the law suffer or sanction such a biased, partial, and prejudiced jury for the trial of one charged with the crime of murder? Any one would say that this would be a judicial outrage upon the legal and constitutional rights of the accused. And yet this is just such a case. The accused has the right to demand that he be tried before a fair and impartial jury. The constitution, article 1, section 7, provides that the accused shall have "a speedy public trial before an impartial jury." Besides this, the right of the accused to have a jury specially selected and impaneled to try him for the crime charged, and his right of challenge, were cut off and denied. It is obvious and self-evident that this jury was an unlawful one, and that the accused was deprived of his constitutional right of trial by jury.

It has been uniformly held, and from early times in the history of jury trials for crime, that the grand jury that found the indictment, and each one of them, is disqualified from sitting on the petit jury to try the accused: *Oates' case*, 10 How. St. Tr. 1079-1081; 1 Bishop's Criminal Procedure, sec. 912; *Colledge's case*, 8 How. St. Tr. 550; Hawk. P. C., bk. 2, c. 43, sec. 27. Our own statute disqualifies the grand juror ⁴⁰⁸ from being a petit juror on the trial of the case: Rev. Stats., sec. 4688. "It is the right of the accused who is to be tried by a jury that the first opinion formed by the jurors shall be the one which results from the evidence produced at the trial." Therefore, the members of the grand jury that framed the indictment, and those who have passed upon the question as jurors in the same case, are disqualified to be jurors to try the accused: 1 Bishop's Criminal Procedure, sec. 911; *Rice v. State*, 16 Ind. 298; *Stewart v. State*, 15 Ohio St. 155. A juror on a former trial that resulted in a mistrial is not competent to serve on the second trial: *Edmondson v. Wallace*, 20 Ga. 660. And that is so, even if the case is not the same, if the issues and the defendant are the same: *Garthwaite v. Tatum*, 21 Ark. 336; 76 Am. Dec. 402. A juror who has formed an opinion on hearing all the evidence in the case, not then being a juror, is disqualified. Much more, where the juror has heard the evidence and formed an opinion once as a juror, is he disqualified: *Argent v. Darrell*, 2 Salk. 648; *Weeks v. Medler*, 20 Kan. 57; *State v. Sheeley*, 15 Iowa, 404; *Thompson and Merriam on Juries*, 195; *Greenfield v. People*,

74 N. Y. 277. Many more authorities are cited to the same principle in the very excellent brief of the learned counsel of the plaintiff in error. But, as said before, it is self-evident that such a jury is not only disqualified from trying the accused for the crime charged, but to force the accused to be tried before such a jury is a denial of his right to a jury trial, so clearly protected by the constitution and the laws. If the grand jury are unfit jurors to try the accused, on the ground that they have formed an opinion in the case, and expressed it by the indictment on a mere *ex parte* examination of the evidence, much more is this jury, that has heard all the evidence on both sides, and disagreed in their opinions.

2. It is conceded by the learned attorney general that neither the minutes of the clerk nor the record shows that the prisoner was present in court when the verdict of guilty ⁴⁰⁹ was rendered against him by the jury, or that he was present when the sentence was pronounced against him, or immediately before, or that he was asked by the court if he had any thing to say why he should not be so sentenced. The record does not show that he was present at any time during the trial for the crime, except when he was arraigned and pleaded. It was his constitutional right, that he may not waive, to be present during the whole trial, and "meet the witnesses face to face," and "to be confronted with the witnesses against him": Amend. Const. of U. S., art. 6; Wis. Const., art. 1, sec. 7. This is not only the indispensable right of the accused, but the record must show that he enjoyed that right, or it does not show that he had a legal and constitutional trial. "In felonies the record must show the defendant to have been present at the arraignment and testing of the jurors." "In capital cases, if not in all felonies, the record must show that the defendant was present at the trial, verdict, and sentence": Wharton's Criminal Pleading and Practice, secs. 545, 549. The crime of murder is still a capital crime in this state, because so recently followed by the death penalty: *People v. Perkins*, 1 Wend. 91. In such cases "the presence of the prisoner is essential, and where the law requires it the record must show it": 1 Bishop's Criminal Procedure, sec. 1353; *Dougherty v. Commonwealth*, 69 Pa. St. 286; *Prine v. Commonwealth*, 18 Pa. St. 103. This is the rule as well in all felonies: *Hooker v. Commonwealth*, 13 Gratt. 763; *Dyson v. State*, 26 Miss. 362; *Rolls v. State*, 52 Miss. 391;

Bearden v. State, 44 Ark. 331; *Smith v. People*, 8 Col. 457; *State v. Johnson*, 35 La. Ann. 208; *State v. Jones*, 61 Mo. 232; *Shapoonmash v. United States*, 1 Wash. Ter. 188; *Lovett v. State*, 29 Fla. 356; Chitty on Criminal Law, 414; *State v. Bucner*, 25 Mo. 167; *State v. Matthews*, 20 Mo. 55; *Clarke v. State*, 4 Humph. 254; *Andrews v. State*, 2 Sneed, 550; *Scaggs v. State*, 8 Smedes & M. 722; *Hopt v. People*, 110 U. S. 574; *Sylvester v. State*, 71 Ala. 17. No presumption will be indulged ⁴¹⁰ in that the prisoner was present if the records fail to show it: *Douglass v. State*, 3 Wis. 820; *Davis v. State*, 38 Wis. 487. This is held as to the arraignment of the prisoner, but his presence is just as essential. In the late case of *Ball v. United States*, 140 U. S. 118, it is held essential that the record should show that the prisoner was present, and asked before sentence whether he had any thing to say why sentence should not be pronounced against him. The chief justice cites *Rex v. Harris*, 1 Ld. Raym. 267; 2 Hale P. C. 401; Comyn's Digest Indictment, N; 2 Hawk. P. C., c. 48, sec. 22; Wharton's Criminal Pleading and Practice, secs. 549-906; *Messner v. People*, 45 N. Y. 1; *Dougherty v. Commonwealth*, 69 Pa. St. 286; 1 Bishop's Criminal Procedure, secs. 275, 1293, and other cases cited above. This case is of itself the highest authority as to this constitutional right of a prisoner in a capital case.

The learned counsel of the plaintiff in error has also briefed this question very ably and exhaustively, and has made many quotations of the text of the opinions to which reference may be made. Many of the above authorities also hold that no presumptions will be indulged in to supply the record in such a case, and that there is no waiver of the right less than a positive and personal relinquishment of it, and this I understand to be the effect of our own decisions. The learned attorney general has cited a few cases that seem to hold the other way, but they are certainly against the great weight of authority in this country as well as in England. These great common-law rights have been made constitutional provisions in the various states, and so made essential and paramount, and also indispensable in trials for capital offenses and felonies. It is not too strict to hold that in all such cases the accused must be present in court to meet the witnesses face to face, and to test the jury, and when the verdict is rendered, and be asked if he has any thing to say why the sen-

tence should not be pronounced against him, and to meet his sentence, ⁴¹¹ and also still more important that he have a trial "by an impartial jury." These are great constitutional safeguards against oppression and injustice that must not be abridged or compromised.

By the COURT. The judgment of the circuit court is reversed, and the cause remanded for a new trial. The warden of the state prison at Waupun will deliver the prisoner to the sheriff of Ashland county, to be held in custody by him until he is discharged from such custody according to law.

TRIAL—JURORS—INCOMPETENCY OF ON ACCOUNT OF BIAS.—The right to unbiased or unprejudiced jurors is an inseparable and inalienable part of the right of trial by jury: Extended notes to *Commonwealth v. Brown*, 9 Am. St. Rep. 744, and *Smith v. Elames*, 36 Am. Dec. 521, where the subject is fully treated.

TRIAL—RIGHT OF ACCUSED TO BE PRESENT.—A prisoner accused of felony must be arraigned and plead in person; and in all subsequent proceedings he must appear in person, and not by attorney: *Sperry v. Commonwealth*, 9 Leigh, 623; 33 Am. Dec. 261; *Sneed v. State*, 5 Ark. 431; 41 Am. Dec. 102, and note; *Hill v. State*, 17 Wis. 675; 86 Am. Dec. 736, and note; *Younger v. State*, 2 W. Va. 579; 98 Am. Dec. 791; *State v. Kelly*, 97 N. C. 404; 2 Am. St. Rep. 299, and note; *State v. Hughes*, 2 Ala. 102; 36 Am. Dec. 411. See, also the extended notes to *Warren v. State*, 68 Am. Dec. 219, and *Fight v. State*, 28 Am. Dec. 629.

BROWN v. VANNAMAN.

[85 WISCONSIN, 451.]

LIBEL—WRITTEN SLANDER UPON BUSINESS.—A letter written by one of two dealers advising a shipper to look out for the other dealer "that you are shipping milk or cream to, unless you have surety for your goods, as he does not pay any of his shippers any thing, and he sells the milk and cream for about what it costs him, and the shippers are the losers," tends directly to prejudice such dealer in his trade and business, and is libelous *per se*.

LIBEL—PRIVILEGED COMMUNICATION—WRITTEN SLANDER UPON BUSINESS.—A letter voluntarily written by one of two rival dealers acting from motives of personal gain to be secured through the injury of his rival, warning a shipper against sending goods to such rival, as he does not pay for them, is not a privileged communication, and a mere belief in the truth of the statements contained therein, without good cause for such belief, is no defense to an action for libel.

LIBEL—DAMAGES.—A verdict for damages in an action for libel, though large, is not subject to change on appeal unless it is so excessive as to create the belief that the jury were misled either by passion, prejudice, or ignorance, and that the court abused its discretion in allowing the verdict to stand.

LIBEL based upon the following letter:

Office of
HUTCHINSON'S MILK DEPOT,
516 Grand Avenue.

MILWAUKEE, May 13, 1891.

C. B. Lichtke, Lannon, Wis.,

DEAR SIR: I would advise you to look out for the man Brown that you are shipping milk or cream to, unless you have surety for your goods, as he does not pay any of his shippers any thing, and he sells the milk and cream for about what it costs him, and the shippers are the losers. I know two men he owes over one hundred dollars apiece. Stop and see me when you come to Milwaukee, and I will give you all the information you want. Stop at 516 Grand Avenue and ask for me.

Yours truly,

A. VANNAMAN.

Verdict and judgment for plaintiff two thousand five hundred and ninety-eight dollars and seventy-seven cents. Defendant appealed.

V. W. Seely and N. S. Murphey, for the appellant.

Williams and May, for the respondent.

454 CASSODAY, J. The plaintiff and the defendant were rivals in the same business and in the same city. The manifest purpose of the letter of May 13, 1891, was to induce the person to whom it was sent to stop selling milk and cream to the plaintiff, and commence selling the same to the defendant. In other words, it was a written slander upon the plaintiff in his trade and business; and as such it tended directly to prejudice the plaintiff therein, and hence was, within the well-established rules of law, libelous *per se*, though not imputing any crime: *Gotbehuet v. Hubachek*, 36 Wis. 515; *Spiering v. Andræ*, 45 Wis. 330; 30 Am. Rep. 744; *Singer v. Bender*, 64 Wis. 169; *Muetze v. Tuteur*, 77 Wis. 236; 20 Am. St. Rep. 115. It follows as a necessary sequence that the exceptions to the several portions of the charge in harmony with the proposition of law above stated must be overruled.

Error is assigned because, in submitting the second question contained in the special verdict, the court charged the jury that "it is not enough for the defendant to testify or to show to you that he believed that the statements made by him were true. He must have had good reason to believe

that the charges made by him were true. The mere assertion by him, under oath, that he believed them to be true, without having good cause to believe that they were true, will not exempt him from liability." The court then submitted it to the jury to determine whether the defendant had good reason to believe the statements contained in his letter to be true or not. Counsel contend that if the ⁴⁵⁵ defendant, at the time of sending the letter believed such statements to be true, then the communication was privileged, and he assigns error because the court refused to give the following instruction: "I instruct you, as a matter of law, that if this letter of May 13, 1891, was written by the defendant, believing it to be true, in good faith, without malice, then it was a privileged communication, and this action cannot be maintained. It is the end of the case if you should find that it is a privileged communication under the rule that I have given you." The instruction so requested and refused seems to have been copied almost literally from one that was given and held not to be error in *Rude v. Nass*, 79 Wis. 326, 24 Am. St. Rep. 717. The reason for such ruling in that case was that the communication there involved was conditionally privileged. This is apparent from what is there said to the effect that counsel on both sides in that case agreed to the rule of law as stated by Folger, C. J., in *Hamilton v. Eno*, 81 N. Y. 122, "that it is for the court to determine whether the subject matter to which the alleged libel relates, the interest in it of the author of it, or his relations to it, are such as to furnish an excuse; but that the question of good faith, belief in the truth of the statement, and the existence of actual malice, remain for the jury." It was there further said, in behalf of this court, that "under this rule the question whether the alleged libel was conditionally privileged was a mixed question of law and fact, to be submitted to the jury under the charge of the court. That is what was done in this case": *Rude v. Nass*, 79 Wis. 327; 24 Am. St. Rep. 717. In the leading case of *Wright v. Woodgate*, 2 Crompt. M. & R. 577, Parke, B., said: "The proper meaning of a privileged communication is only this: that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact—that the defendant was ⁴⁵⁶ actuated by motives of personal spite or ill-will,

independent of the occasion on which the communication was made." This language was expressly sanctioned by Mr. Justice Daniel in *White v. Nicholls*, 3 How. 287, and also in a recent case in the house of lords—*Jenoure v. Delmege*, (1891) App. Cas. 78.

In the case at bar the trial court held as a matter of law that the letter mentioned was not a privileged communication, and we are constrained to concur in such ruling. It does not appear that the defendant had any legitimate interest in the business conducted by the plaintiff, nor in the purchases made by him from the person to whom the letter was addressed, nor was he under any obligation or duty to make the communication, nor was the communication made in the interest of the public or good morals, but, on the contrary, the defendant wrote and published the letter as a mere volunteer, acting from motives of personal gain to be secured through the injury of a rival in business. It certainly does not answer the description of either the second, third, or fourth kinds of privileged communications mentioned by Mr. Justice Daniel, and held by the supreme court of the United States, in the case cited. We think it is equally clear that it does not fall within the first kind there defined as follows: "Whenever the author and publisher of the alleged slander acted in the *bona fide* discharge of a public or private duty, legal, or moral, or in the prosecution of his own rights or interests." We find no error in the charge given, nor in the instruction refused. Of course, a mere belief in the absence of any good reason to so believe, as mentioned in the portion of the charge quoted, would not be available as a defense.

The only doubt we have had in this case is whether we should not reverse the judgment by reason of the excessive damages found. Had the trial court, in the exercise of the very large discretion vested in it in such cases, set aside ⁴⁵⁷ the verdict, and granted a new trial unless the plaintiff remitted a portion of such damages, we should have felt more certain that justice had been done between the parties: *Corcoran v. Harran*, 55 Wis. 125; *Baker v. Madison*, 62 Wis. 149; *Murray v. Buell*, 74 Wis. 17. But we cannot say that the damages found are so excessive as to create the belief that the jury were misled either by passion, prejudice, or ignorance, and that the court abused its discretion in allowing the verdict to stand; and hence, within the adjudications last cited, we do not feel authorized to reverse the judgment upon

that ground. "Besides, the trial court has a much broader discretion in such matters than this court": *Heddles v. Chicago etc. Ry. Co.*, 74 Wis. 259.

Other minor exceptions, mentioned in the brief of counsel, must be regarded as overruled.

By the COURT. The judgment of the superior court of Milwaukee county is affirmed.

A motion for a rehearing was denied June 21, 1893.

LIBEL—PUBLICATIONS INJURIOUS TO ONE'S BUSINESS.—Written or printed words which are injurious to a person in his office, profession, or calling, or which impeach the credit of any merchant or trader, are libelous: *Hayes v. Press Co.*, 127 Pa. St. 642; 14 Am. St. Rep. 874, and note. Language is actionable which is spoken falsely and maliciously concerning a person in his lawful business, which may, or does, as a natural consequence, prevent him from deriving that pecuniary reward which probably otherwise he might have obtained: *Missouri Pac. Ry. Co. v. Richmond*, 73 Tex. 568; 15 Am. St. Rep. 794, and note. Words are libelous though they do not defame a man in the ordinary sense, if they affect his business by imputing to him incapacity or unfitness for its management: *Moore v. Francis*, 121 N. Y. 199; 18 Am. St. Rep. 810.

LIBEL—JUSTIFICATION.—Belief in the truth of a libelous charge does not justify its publication if it is false and injurious and not privileged: *King v. Root*, 4 Wend. 113; 21 Am. Dec. 102, and note; *Edwards v. San Jose Printing Soc.*, 99 Cal. 431; 37 Am. St. Rep. 70, and note; *Moore v. Francis*, 121 N. Y. 199; 18 Am. St. Rep. 810. See the note to *Missouri Pac. Ry. Co. v. Richmond*, 15 Am. St. Rep. 802.

EXCESSIVE VERDICTS—SETTING ASIDE.—When the amount of a verdict is such as to shock a sense of justice, and must have been the result of passion or prejudice on the jury, the judgment rendered in accordance with it will be reversed as excessive: *Western Union Tel. Co. v. Houghton*, 82 Tex. 561; 27 Am. St. Rep. 918; *Louisville etc. R. R. Co. v. Minogue*, 90 Ky. 369; 29 Am. St. Rep. 378, and note; *Morgan v. Southern Pac. Co.*, 95 Cal. 510; 29 Am. St. Rep. 143, and note.

MCQUAID v. ROSS.

[85 WISCONSIN, 492.]

SALES—IMPLIED WARRANTY THAT ANIMAL IS NOT IMPOTENT.—If on the sale of a bull both parties are alike destitute of knowledge or the means of forming an intelligent judgment whether he is able or not to generate his kind, and there is no misrepresentation or fraud, and no express warranty, no warranty is implied in that respect merely because a full price is paid for the animal for breeding purposes, and the seller knows that he is being purchased for that purpose.

W. J. Hooper and Spensley and McIlhon, for the appellant.

J. M. Smith and Orton and Osborn, for the respondents.

494 PINNEY, J. There is no ground for contending that the plaintiff in purchasing the animal in question either asked the opinion or judgment of the vendors in respect to its procreative capacity, nor is there any reasonable or rational ground for imputing to them any information or knowledge on that subject not possessed by the plaintiff, although they had raised the bull and were stock breeders. The plaintiff saw and inspected the animal before he made the purchase, and it was of the kind he desired to purchase. It is a well-understood principle of the common law in England, and almost universal in this country, that in sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity or thing sold, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the thing **495** he sells, the maxim *caveat emptor* applies. This is the rule laid down in *Benjamin on Sales*, sec. 644; *Barnard v. Kellogg*, 10 Wall. 388; *Jones v. Just*, L. R. 3 Q. B. 202. In *Eagan v. Call*, 34 Pa. St. 236, 75 Am. Dec. 653, it was held that where the buyer has had opportunity of examining the thing sold there is no implied warranty by the seller against latent defects unknown alike to himself and to the purchaser.

The doctrine of implied warranty appears to be founded on an actual or presumed knowledge by the vendor, as manufacturer, grower, or producer, of the qualities and fitness of the thing sold for the purpose for which it was intended or is desired, so far as such knowledge is reasonably attainable. The rule must be held to have a rational foundation, and to be not of a purely arbitrary character. It does not impute to the seller knowledge as to qualities or fitness which no human foresight or skill can attain, and raise an implied warranty in respect to them when the vendor and purchaser are in equal condition as to means of knowledge, or the latter must have understood from the nature of the case that the information, experience, and knowledge of the vendor are not superior to his own. The case we are considering is not one where the buyer can be said necessarily, or at all, to have trusted to the judgment or skill of the manufacturer, grower, producer, or dealer, instead of his own: *Jones v. Just*, L. R. 3 Q. B. 202. Because the defendants raised the bull they sold to the plaintiff they are not chargeable with any knowledge, or opinion even, in respect to a matter beyond the reasonable scope of human knowledge, namely, whether the bull would prove

impotent, and to be wholly destitute of the power of procreating his kind; and hence the ground of presumed or reasonably imputed knowledge as a foundation in this case of an implied warranty wholly fails.

In the case of *White v. Miller*, 71 N. Y. 118, 131, 27 Am. Rep. 13, it is said, in relation to the case of a manufacturer, that the rule ⁴⁹⁶ of implied warranty "is based on the presumed superior knowledge of the vendor," and that, in the case of a producer or grower of seeds, there seems to be the same reason for implying a warranty, on a sale of seeds by the grower, that they are not defective from improper cultivation, as to imply a warranty of freedom of defects in manufacture on a sale by a manufacturer of the article made by him. "The grower of seeds must be presumed to be cognizant of any omissions or negligence in cultivation, whereby they have been deteriorated or rendered unfit for use"; as, in the case cited, in relation to a sale of cabbage seed which had been crossed with other varieties, and rendered impure by being raised in close proximity with them. In *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136, cited by appellant's counsel, the article sold was represented to be of a particular kind, when it was not, and there was, therefore, an express warranty. In *Flick v. Wetherbee*, 20 Wis. 392, the decision went not upon the ground of implied warranty, but that the defendant covenanted to supply all the seed-corn for the year's cultivation, which, it was held, required him to furnish good seed-corn, and there was, besides, evidence of an express warranty. The case of *Scott v. Renick*, 1 B. Mon. 63, 35 Am. Dec. 177, in which it was held that the law implies no warranty, in a sale of a Durham cow, that she will prove suitable for breeding purposes, although the price paid for her indicated that it was for that purpose she was bought, is in accord with what was said in *White v. Stelloh*, 74 Wis. 435, 439, on the subject of implied warranty in a similar case: *Barnes v. Burns*, 81 Wis. 235.

If the plaintiff desired to guard against loss from the contingency which occurred, he should have exacted an express warranty as a condition of his purchase. Where, as in this case, both parties were alike destitute of knowledge or the means of forming an intelligent judgment whether the bull would be able or not to generate his kind, and there ⁴⁹⁷ was no misrepresentation or fraud, and no express warranty, we think no warranty can be implied in that respect merely

because a full price was paid for a bull for breeding purposes, and the seller knew he was being purchased for that purpose. The plaintiff was rightly nonsuited.

By the COURT. The judgment of the circuit court is affirmed.

SALES—WARRANTY—WHEN NOT IMPLIED.—On the sale of a bull calf at the age of three months, apparently free from defects, and present to the view of the purchaser, it cannot be held that his sterility existed at the time of his sale, and that there was an implied warranty that at maturity he would possess the power of procreation: *White v. Stelloh*, 74 Wis. 435. The law implies no warranty in the sale of a Durham cow that she will prove suitable for breeding purposes, although the price paid for her indicates that it was for that purpose that she was bought: *Scott v. Renick*, 1 B. Mon. 63; 35 Am. Dec. 177, and note. Upon the sale of a live cow by a farmer to butchers there is no implied warranty that she is fit for food, though he knows that they buy her for that purpose: *Howard v. Emerson*, 110 Mass. 320; 14 Am. Rep. 608; *Bartlett v. Hoppock*, 34 N. Y. 118; 88 Am. Dec. 428, and note. When there is no express warranty, and a vendor sells a thing as sound which is unsound—has a latent defect unknown to him—he is not answerable to the buyer: *Westmoreland v. Dixon*, 4 Hayw. 223; 9 Am. Dec. 763, and note; *Eagan v. Call*, 34 Pa. St. 236; 75 Am. Dec. 653, and note; *Weimer v. Clement*, 37 Pa. St. 147; 78 Am. Dec. 411, and note. No warranty is implied from a sound price on an executed sale of a chattel, and if there is no fraud or express warranty, the buyer takes the risk of the quality and condition of the article: *Moses v. Mead*, 1 Denio, 378; 43 Am. Dec. 676, and note; *Johnston v. Cope*, 3 Har. & J. 89; 5 Am. Dec. 423; *Dean v. Mason*, 4 Conn. 428; 10 Am. Dec. 162, and note. The doctrine of the principal case will be found discussed in the extended notes to *Emerson v. Brigham*, 6 Am. Dec. 113; *Fairbank Canning Co. v. Metzger*, 16 Am. St. Rep. 758; and the note to *Hexter v. Bast*, 11 Am. St. Rep. 879.

STATE v. EATON.

[85 WISCONSIN, 587.]

JUDGMENTS—ORDER FOR IN DIVORCE PROCEEDINGS—RETROACTIVE EFFECT OF.—An order for judgment in divorce proceedings does not affect the status of the parties, nor render them capable of contracting marriage with third persons; and the judgment, when afterwards entered, cannot operate to make an act of sexual intercourse adultery which was not a crime when committed, or if then a crime, to make it one of a higher grade.

J. M. Clancey, assistant attorney general, for the state.

G. E. Sutherland and J. J. Dick, for the defendant.

587 LYON, C. J. The defendant was tried in the municipal court of Milwaukee county on an information charging him

with the crime of adultery with one Louise Gray, and was convicted. To sustain the conviction, it was essential that the defendant should have been a married man when the alleged offense was committed. It is charged in the information that he was then the lawful husband of Letitia Eaton, and it was proved on the trial that before the alleged adultery was committed a marriage ceremony was performed between him and one Letitia Pfleger. It was also proved that said Letitia had theretofore lawfully intermarried with one Joseph Pfleger, who is still living, and had commenced and prosecuted an action for a divorce against said Joseph in the superior court of Milwaukee county. ⁵⁸⁸ That action was tried, and the court filed findings of fact sustaining her cause of action, and ordered that a judgment of divorce and for alimony be entered accordingly. No judgment was entered upon such findings and order until more than two and one-half years later, when judgment was entered as of the date of such findings and order. Before such judgment was entered, the attempted intermarriage between defendant and Letitia occurred.

The judge of the municipal court has duly reported the case to this court for its decision upon the following question: "Was Letitia Pfleger capable of contracting marriage with the defendant at the time the ceremony was performed?" The question must be answered in the negative. An order for judgment is not a judgment. Notwithstanding the order in the Pfleger divorce case, the parties continued to be husband and wife for the two and one-half years and more which intervened after the order was made, and before the judgment was actually entered pursuant thereto. If, for any purpose, the judgment of divorce, when entered, took effect from the date of the order therefor (a proposition not here determined), it could not operate to make an act a crime which was not a crime when committed, or, if then a crime of one grade, to make it a crime of a higher grade. To hold otherwise would be to violate the most fundamental principles of law established for the protection of persons charged with crime. It is unnecessary to cite authorities in support of, or to argue, so plain a proposition.

By the COURT. The question submitted for our decision is answered in the negative, and the municipal court advised to arrest judgment and discharge the defendant. It will be so certified to that court.

MARRIAGE AND DIVORCE—EFFECT OF JUDGMENT FOR DIVORCE, WHETHER RETROACTIVE.—A decree of divorce does not relate back, but takes effect only from the date of the judgment: *Alt v. Banholzer*, 39 Minn. 511; 12 Am. St. Rep. 681, and note; *Van Cleaf v. Burns*, 118 N. Y. 549; 16 Am. St. Rep. 782, and note. A judgment of divorce becomes effective at the time of its rendition, although it is not entered by the clerk until a subsequent date: *Estate of Cook*, 77 Cal. 220; 11 Am. St. Rep. 267, and note; *Estate of Newman*, 75 Cal. 213; 7 Am. St. Rep. 146.

SMITH v. SCHREINER.

[86 WISCONSIN, 19.]

JUDGMENTS—APPEAL—ESTOPPEL.—A mere appeal does not affect a judgment as a bar to another action.

Bushnell and Watkins, for the appellant.

Carter and Burns, for the respondent.

20 ORTON, J. Dr. Jehiel H. Hyde executed his last will and testament November 20, and died December 7, 1869, in Grant county, this state. The will was duly probated, and one Addison Burr, named as executor in the will, was duly appointed, and made his final settlement in January, 1870, and there remained in his hands, after payment of all the debts, the sum of seven thousand three hundred and thirteen dollars and sixty-one cents, which amount, by the order of the county court, was paid over to Mrs. Sarah Hyde, the widow of the testator, according to the will.

By the will all of the estate of the testator, real and personal, was devised and bequeathed to his wife, the said Sarah, "to have and to hold during her natural life, unless she should again marry, in which case she shall forfeit all right to the personal estate that may remain, and all right **21** to the real estate or the proceeds thereof. The personal estate, before such remarriage, she may dispose of as her necessities may require, or as her judgment may dictate to be right and expedient." She was authorized and empowered to sell and convey the homestead, and have the use of the proceeds during her natural life. "On her remarriage or death all the personal estate that may remain unexpended, and all the real estate or proceeds thereof, shall be equally divided among the children of the testator's brother of full blood." There was a bequest or legacy of six hundred dollars to the plaintiff, Julia Smith, wife of Dr. C. Stoddard Smith, to be paid at the time of the final distribution of the estate.

It appears that said Sarah Hyde, the widow of the testator, before her decease, disposed of nearly, or quite all, of the personal estate which came to her hands under the will, to the said Julia Smith, the said plaintiff, and to her husband, the said Dr. C. Stoddard Smith, of the value of five or six thousand dollars. The appellant, as the administrator of the estate *de bonis non*, brought suit in equity against the said Julia and C. Stoddard Smith in the circuit court of the United States, for the northern district of the state of Illinois, about May 17, 1886, for the purpose of compelling them to account for such part of the estate as came to their hands by and through the said Sarah Hyde as aforesaid, and pay the same over to him as administrator *de bonis non* of said estate. On the final hearing of said suit said court dismissed the complaint therein on its merits, for want of equity, and said judgment still remains unreversed on the records of said court. It was held in said suit that the above clause of the will clothed Mrs. Sarah Hyde, the said widow of the testator, with the full power of disposition of the personal estate, and that such disposition thereof by her, in her lifetime, to the said Julia Smith and her husband, was absolute and binding on the residuary legatees. The said administrator *de bonis non* ²² thereupon appealed from said judgment to the supreme court of the United States, where said appeal is still pending, and no *supersedeas* was granted thereon.

This action is brought by the said Julia Smith to recover her said legacy of six hundred dollars, and the said administrator *de bonis non* has answered, setting up that the plaintiff has already in her hands said five or six thousand dollars she received from the said Mrs. Sarah Hyde as aforesaid, as a part of said estate, which should be applied to the full payment of said legacy. The plaintiff sets up the said judgment in bar of this defense as *res adjudicata* of the same matter and between the same parties; and the circuit court so held, and rendered judgment against the appellant for said six hundred dollars, less fifty-nine dollars and twenty-five cents already paid, with interest from October 1, 1889.

The main question on this appeal is therefore whether said judgment is a bar, notwithstanding said appeal. This question has not been directly decided by this court. *Neuman v. State*, 76 Wis. 112, seems, however, to decide the principle. Proceedings were taken before the village board to revoke the license of Neuman to sell liquors in the village of Bloom-

ington. The board entered an order revoking his license. He took the case to the circuit court on *certiorari*, and the circuit court affirmed the order. He then appealed from that judgment to this court, and while the appeal was pending he was prosecuted for selling liquor without license during the time of his license if it had not been revoked; and the question was whether the order of the board did not continue in force, so as to make such selling illegal, notwithstanding the *certiorari* and the appeal, and this court held that it did, and that his conviction was legal. The order of the board was in the nature of a final judgment, and continued in force after a *certiorari* to the circuit court, and after an appeal to this court from the judgment of the circuit court affirming the order of the ²³ board. If this case was correctly decided, and as long as it remains the law of that case, it is difficult to see how this court can hold that an appeal from any final judgment affects the force and conclusiveness of the judgment as *res adjudicata* and as a bar to another action, for the principle appears to be precisely the same in both cases. What would be the effect upon the judgment if a *supersedeas* or stay of proceedings had been granted we need not inquire, for there was neither in this case.

In many of the states, and perhaps in most, it is held that an appeal destroys the effect of a judgment as *res adjudicata*, and, while pending, the judgment cannot be pleaded in bar to another action for the same cause between the same parties. The learned counsel of the appellant cite many of these cases. But on the other hand, in many of the states the courts of equal credit and respectability hold otherwise, and we think with better reason. In 2 Black on Judgments, section 685; the learned author says: "Reasonable as this view appears, it must be admitted that it is opposed by a settled line of decisions in numerous other states." "In the federal practice a writ of error to the circuit court does not have the effect, pending the proceedings, to suspend the operation of the judgment as a bar or estoppel": 2 Black on Judgments, sec. 510, citing *Oregonian Ry. Co. v. Oregon Ry. & Nav. Co.*, 27 Fed. Rep. 277. This being a judgment of a federal court, this practice should have weight in deciding its effect after an appeal.

In New York, by repeated decisions, an appeal does not affect the judgment as an estoppel: *Parkhurst v. Berdell*, 110

N. Y. 386; 6 Am. St. Rep. 384; *Sage v. Harpending*, 49 Barb. 166. Such is the settled doctrine in Indiana: *Burton v. Burton*, 28 Ind. 342, and many other cases. See, also, *Young v. Brehe*, 19 Nev. 379; 3 Am. St. Rep. 892; *Bank of North America v. Wheeler*, 28 Conn. 433; 73 Am. Dec. 683; *Faber v. Hovey*, 117 Mass. 107; 19 Am. Rep. 398; *Planters' Bank v. Calvit*, 3 Smedes & M. 143; 41 Am. Dec. 616; *Scheible v. Slagle*, 89 Ind. 328; *Allen v. Mayor*, 24 9 Ga. 286; *Paine v. Schenectady Ins. Co.*, 11 R. I. 411; *Cloud v. Wiley*, 29 Ark. 80. Suffice it to say that in very many of the leading states this is the settled doctrine; and Mr. Freeman (*Freeman on Judgments*, sec. 328) seems to think that is the prevailing doctrine of the courts, and that the cases which hold otherwise are exceptional. Many of the cases which seem to hold otherwise are in admiralty, or on orders, or depending on statutes. There is a strong reason in favor of the rule, in order to discourage or prevent a multiplicity of actions between the parties for the same cause wherever possible. "*Nemo debet bis vexari pro una et eadem causa.*" There is no good reason why a mere appeal from the judgment should suspend the operation of this rule. The party should await the result in the tribunal he has selected, before vexing his adversary with other suits for the same cause. By any other rule, judgments in the same controversy, and appeals thereon, may be numberless.

We prefer to hold, therefore, that a mere appeal does not affect the judgment as a bar to another action, sustained as it is by reason and such respectable authorities. This holding disposes of all the matters in defense of the action, without which the plaintiff was entitled to recover. The circuit court properly found that the defendant, as administrator *de bonis non*, has in his hands twelve hundred dollars, money belonging to said estate, and that there is no reason why a division of the estate should not be made among the children of the testator's brother according to the will.

By the COURT. The judgment of the circuit court is affirmed.

JUDGMENTS—APPEAL—ESTOPPEL.—The California doctrine is that a judgment from which a right of appeal exists cannot support a plea of *res judicata*: *Brown v. Campbell*, 100 Cal. 635; 38 Am. St. Rep. 314; and *Naftzger v. Gregg*, 99 Cal. 83; 37 Am. St. Rep. 23. But see the extended note to the latter case, where this subject is discussed at length, and in which the doctrine of the principal case is sustained, and that of the California cases denounced.

SCHILTZ v. ROENITZ.

[86 WISCONSIN, 81.]

ADOPTION—EFFECT OF.—A statutory proceeding of adoption, not according to the course of the common law, when legally conducted, utterly terminates all relations between the minor and his legitimate parents.

ADOPTION—NOTICE TO PARENT.—An order of adoption based on the abandonment of a minor child by his parent, is not conclusive against the latter if issued without notice to him of the proceeding, and an opportunity given to defend against them.

ACTION by plaintiff to recover damages for being deprived of the services of his minor daughter, and for the alienation of her affections from him. Plaintiff appealed from a judgment dismissing his complaint.

G. W. Foster, for the appellant.

Simon Gillen, for the respondent.

37 PINNEY, J. It is not disputed but that a father has dominion, by right, over his minor children, nor that such primary right may be lost or forfeited by him by abandonment, neglect, or abuse. The right of the parent is not absolute and unconditional. The necessities and well-being of the social state enter so largely into the question of the dominion and control of the parent over his child that, in the interest of society and the physical and moral necessities of the child, the entire subject is one of appropriate legislation, providing in what manner the parent may be deprived or restrained in the exercise of his natural rights by reason of neglect, abandonment, or abuse. All this is well established by approved text-writers and numerous adjudications: Schouler on Domestic Relations, sec. 248; *Milwaukee Industrial School v. Milwaukee County*, 40 Wis. 328; 22 Am. Rep. 702; *Sheers v. Stein*, 75 Wis. 44; *Petition of Ferrier*, 103 Ill. 367; 42 Am. Rep. 10; *Cincinnati House of Refuge v. Ryan*, 37 Ohio St. 197; *Farnham v. Pierce*, 141 Mass. 203; 55 Am. Rep. 452; *Clark v. Bayer*, 32 Ohio St. 299; 30 Am. Rep. 593. The principle stated in these cases finds expression in the provision of our statute (sec. 3964) that "the father of the minor, if living, and in case of his death, the mother, while she remains unmarried, being themselves respectively competent to transact their own business, and not otherwise unsuitable, shall be entitled to the care and custody of the person of the minor." The state intervenes only upon the destitution and necessity

of the child, and in all cases of controverted right to its custody its welfare is a matter of primary consideration.

³⁸ Questions in relation to the care and custody of minor children, by reason of their being neglected, or for other cause, whereby they are committed to industrial schools or houses of refuge, or other like institutions, where the interference with parental custody is temporary merely, and which do not change the *status* or adjudicate finally upon the right of the parent to its custody, are materially different from the proceeding under consideration. In the case of *Milwaukee Industrial School v. Milwaukee County*, 40 Wis. 339, 22 Am. Rep. 702, it was said that the statute in that case "operates, so to speak, upon the child *in personam*, without citing the parent or guardian by the proceeding or by the commitment. It appears to us quite obvious, upon familiar principles, that the parent or guardian is not precluded by the commitment from asserting any right to the custody and care of the child which he may afterwards be able to establish. . . . The commitment during minority binds the child only, not the parent or guardian, when competent to fulfill towards the child the duties assumed by the state." But the proceeding by adoption here in question is a mere statutory proceeding not according to the course of the common law, and, when legally conducted, has a much broader scope, and utterly terminates all relations between the minor and his legitimate parents. "A child so adopted shall be deemed, for the purposes of inheritance and succession by such child, custody of the person, and right of obedience by such parents by adoption, and all other legal consequences and incidents of the natural relation of parents and children, the same to all intents and purposes as if such child had been born in lawful wedlock of such parents by adoption. . . . The natural parents of such child shall be deprived by such order of adoption of all legal rights whatsoever respecting such child, and such child shall be freed from all legal obligations of maintenance and obedience to such natural parents": Rev. Stats., sec. 4024. The statute (sec. ³⁹ 4022) requires that such order shall be made upon petition, and shall not "be made without the written consent of the living parents of such child, unless the court shall find that one of the parents has abandoned the child or gone to parts unknown, when such consent may be given by the parent, if any, having the care of the child. In case where neither of the parents is living, or, if living, have abandoned the child, such consent

may be given by the guardian of such child, if any. If such child has no guardian, such consent may be given by any of the next of kin of such child, or, in the discretion of the court, by some suitable person to be appointed by the court." The order is required to recite the facts of the case, and to declare that from and after its date such child shall be deemed, to all intents and purposes, the child of the petitioners; and by such order the name of such child may be changed to that of such parents by adoption, and the statute gives the order the effect already stated.

The proceedings and order of adoption relied on by the defendant do not recite or show any consent of either the parents of the child, Mary Schiltz, or by any of her next of kin or her guardian, to such adoption, but of Jacob Imig, "duly appointed by the court for that purpose"; but the proceedings recite that the plaintiff had abandoned her, and that her mother was dead. There is nothing whatever to show that any notice was ever given to the plaintiff to appear and defend against the application, or assert his natural rights, or that he appeared at the hearing; but the inference from the record is quite to the contrary. Although it is too well settled to admit of dispute that the father can recover for the loss of the services of his minor child, against any one causing such loss (*Rooney v. Milwaukee Chair Co.*, 65 Wis. 397), the proceeding in question was held by the court conclusive evidence, by judicial decision, that he had abandoned his daughter Mary, and that by virtue ⁴⁰ of the alleged order of adoption he had been lawfully deprived of the right to her services, of all legal rights whatsoever respecting her, and that she was free from all natural filial relations to her father, although he had had no notice of the charge, or time and place of hearing, and no opportunity whatever to defend against it, and although he had been condemned without a hearing, and denied the charge of abandonment in his complaint in this action. The circuit court held the charge of abandonment conclusively established by the order of adoption, and dismissed his complaint.

The contention that the county court could, without notice to the plaintiff, or opportunity to him to defend against the charge of abandonment, grant an order depriving the plaintiff of his most sacred natural rights in respect to his child, so jealously guarded and protected by the laws, offends against all our ideas respecting the administration of justice, and is

opposed to the principles which lie at the foundation of all judicial systems not essentially despotic in their character and methods of procedure. It is provided by the fourteenth amendment to the constitution of the United States that "no state shall deprive any person of life, liberty, or property without due process of law." Due process of law, as applied to judicial proceedings, includes a charge before some judicial tribunal, and notice to the party in some form, either actual or constructive, and an opportunity to appear and produce evidence in his defense, and be heard by himself or counsel. To proceed to adjudicate in the absence of notice to the party "would be contrary to the first principles of the social compact, and of the right of administration of justice": *McVeigh v. United States*, 11 Wall. 267. In *Windsor v. McVeigh*, 93 U. S. 277, it is held that "whenever one is assailed in his person or his property, there he may defend; for the liability and the right are inseparable. This is a principle of natural justice,⁴¹ recognized as such by the common intelligence and conscience of all nations. A sentence of the court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. That there must be notice to the party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter." These are familiar principles, existing before, and secured by the fourteenth amendment, and they are sustained by a vast number of adjudicated cases, and a wealth of argument and illustration with which it is not necessary to extend a judicial opinion. The cases all hold a consistent rule on this fundamental point. The paramount law of the land condemns the proceeding here in question, and it is impossible to justify or sustain it. We have not been referred to a single adjudicated case which holds that such an order as this is valid, as against the claim of the natural father to the services of his minor child, or as affording any evidence that he has abandoned it. Certainly, nothing is gained by saying that the proceeding is one *quasi in rem*, for in all such notice to the party to be affected and bound, either actual or constructive, is absolutely essential. Nor is it material that

the order may be set aside on petition, appeal, or *certiorari*. The fact still remains that, as to the father, the order is a mere nullity, and may be disregarded as such whenever and wherever it comes in question as against him or as affecting his rights. But the order in question may well be held valid as against the minor child, as in the case of the commitment to the industrial school of Milwaukee: *Milwaukee Industrial School v. Milwaukee Co.*, 40 Wis. 328; 22 Am. Rep. 702. The judgments and decisions of a judicial tribunal are conclusive and secure against collateral ⁴² attack only when the tribunal rendering them had jurisdiction of the subject matter and of the parties to be affected by them. By reason of the want of jurisdiction of the person of the plaintiff, the proceeding in question established nothing as against him, and is no evidence that he abandoned his child. That question remains open, therefore, for trial upon the issue tendered by the complaint. No other point was raised or discussed, and it follows that the judgment of the circuit court dismissing the plaintiff's complaint is erroneous, and must be reversed.

By the COURT.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

ADOPTION: For a full discussion of this subject, see *Van Matre v. Sankey*, 148 Ill. 536; *ante*, p. 196, and extended note.

HART v. CITIZENS' INSURANCE COMPANY.

[86 WISCONSIN, 77.]

INSURANCE—LIMITATION OF ACTION ON POLICY.—A provision in an insurance policy that no action shall be sustained to recover a claim thereunder "unless commenced within twelve months next after the fire," limits the time within which such action may be commenced to twelve months from the date of the fire, and not from the time when liability is fixed and a right of action accrues to the insured.

INSURANCE—APPLICATION OF STATUTE.—A provision in an insurance policy that no action shall be sustained thereon "unless commenced within twelve months next after the fire," is not affected by a statute providing that no insurance policy shall contain a provision that no action shall be brought thereon.

Reed, Grace, Rock and Reed, for the appellant.

J. B. Douglas, for the respondent.

⁷⁸ WINSLOW, J. The action is upon a policy of insurance issued by defendant November 11, 1890, upon plaintiff's

dwelling-house. There is no dispute as to the facts. The house was burned March 5, 1891. Proofs of loss were served May 1, 1891, being within the time required by the policy. The defendant refused payment May 9, 1891, and plaintiff commenced this action May 3, 1892, nearly fourteen months after the fire.

The policy contained provisions requiring immediate notice of loss, proofs within sixty days after the fire, examination of the assured under oath, if desired, and appraisal in case of disagreement as to amount of loss; also the following: "This company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof, by any requirement, act, or proceeding on its part relating to the appraisal, or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required. No suit or action on this policy for the recovery of any claim shall be sustained in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

It was held by the circuit court that the action was barred, because not commenced within twelve months next after the date of the fire, and plaintiff appeals.

⁷⁹ It is well settled that a clause in a contract limiting the time within which an action may be commenced thereon, to a time shorter than that allowed by the statute of limitations, is valid. The question here is whether the expression "twelve months after the fire" means what it says, or some thing else. It is to be noticed that the parties here have not used the expression "after the loss occurs." Had this been the language used, it might reasonably be claimed, upon authority, that the "loss occurs," not at the date of the fire, but when the loss is ascertained and established, and the right to bring an action exists. The decisions in favor of this doctrine are numerous: *Steen v. Niagara F. Ins. Co.*, 89 N. Y. 315; 42 Am. Rep. 297; *Spare v. Home Mut. Ins. Co.*, 17 Fed. Rep. 568; *Chandler v. St. Paul etc. Ins. Co.*, 21 Minn. 85; 18 Am. Rep. 385; *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa, 507; *Miller v. Hartford F. Ins. Co.*, 70 Iowa, 704; *German Ins. Co.*

v. *Fairbank*, 32 Neb. 750; 29 Am. St. Rep. 459; *Barber v. Wheeling Fire etc. Ins. Co.*, 16 W. Va. 658; 37 Am. Rep. 800.

There are, however, many decisions to the contrary: *Chambers v. Atlas Ins. Co.*, 51 Conn. 17; 50 Am. Rep. 1; *Johnson v. Humboldt Ins. Co.*, 91 Ill. 92; 33 Am. Rep. 47; *Fullam v. New York Union Ins. Co.*, 7 Gray, 61; 66 Am. Dec. 462; *Glass v. Walker*, 66 Mo. 32; *Bradley v. Phoenix Ins. Co.*, 28 Mo. App. 7; *Virginia F. & M. Ins. Co. v. Wells*, 83 Va. 736; *Peoria Sugar Refining Co. v. Canada F. & M. Ins. Co.*, 12 Ont. App. 418; *Blair v. Sovereign Ins. Co.*, 19 N. S. 372; *Traveler's Ins. Co. v. California Ins. Co.*, 1 N. Dak. 151; *Schroeder v. Keystone Ins. Co.*, 2 Phila. 286.

Other cases, bearing more or less directly on the question, might be cited upon either side of the proposition. It seems apparent that it can hardly be said that the great weight of authority is on either side. It is a case where there are two directly opposing lines of authorities, both very respectable in numbers and weight. It was claimed by appellant that this court had substantially approved of the ⁸⁰ affirmative view of the proposition in *Killips v. Putnam F. Ins. Co.*, 28 Wis. 472, 9 Am. Rep. 506, and *Black v. Winneshiek Ins. Co.*, 31 Wis. 74. Examination of these cases shows that this court expressly declined to pass upon this question. The principle laid down in them is simply that if the insurance company, by its acts, induces the insured to suspend his proceedings and delay action on the policy, the time elapsing during such delay so caused should not be reckoned as a part of the time limited for the bringing of the action. It is an application of the familiar principle of estoppel.

Doubtless, the tendency of so many courts to construe the term "loss" as meaning the time when liability was fixed, induced many insurance companies to substitute the word "fire," as in the policy before us. It would seem as if the phrase "twelve months next after the fire" was susceptible of but one meaning; yet the courts have disagreed upon this question also. In the following cases it has been held that the word "fire" is to be construed as meaning, not the date of the fire, but the time when liability is fixed and an action accrues to the insured: *Friezen v. Allemania F. Ins. Co.*, 30 Fed. Rep. 352; *Hong Sling v. Royal Ins. Co.*, 7 Utah, 441; *Case v. Sun Ins. Co.*, 83 Cal. 473.

On the other hand, the following cases hold that the limitation begins to run from the date of the fire: *Steel v. Phenix*

Ins. Co., 47 Fed. Rep. 863; *State Ins. Co. v. Meesman*, 2 Wash. 459; 26 Am. St. Rep. 870; *McElroy v. Continental Ins. Co.*, 48 Kan. 200; *State Ins. Co. v. Stoffels*, 48 Kan. 205; *King v. Watertown Ins. Co.*, 47 Hun, 1.

It is noticeable that all of the three cases above cited which hold that "fire" means the time when liability is fixed rely for authority upon the cases which construe the word "loss" as having such meaning. No attention seems to have been given to the fact that the word "fire" has been substituted for the word "loss." It is also noticeable that in the case of *Case v. Sun Ins. Co.*, 83 Cal. 473, the facts ⁸¹ were that the insured was compelled to submit to examination by the company, and to produce books, bills, and invoices, and that he complied with these requirements as rapidly as he was able, but was unable to fully comply therewith until more than thirteen months after the fire, or a month after the expiration of the time limited for bringing suit. Here, certainly, was a clear case of estoppel. The company, by its own acts, had postponed the time when a cause of action accrued until after the limitation had run, and should clearly be denied the right to rely upon the limitation: See, to this effect, *Thompson v. Phenix Ins. Co.*, 136 U. S. 287. The cases of *Friezen v. Allemania F. Ins. Co.*, 30 Fed. Rep. 352, and *Hong Sling v. Royal Ins. Co.*, 7 Utah, 441, are, however, direct authorities to the effect that "twelve months after the fire" means twelve months after the liability is fixed. The argument in support of this view is, briefly, that all clauses of the policy must be construed together; that there are clauses which necessitate the making of proofs, the submission of the assured to examination if required, the production of books and papers, and the submission of the question of the amount of loss to appraisers, all of which things will consume time; and, furthermore, the loss not being payable until sixty days after the amount is fixed, it may happen that more than twelve months may elapse after the date of the fire before the company can be sued; and thus the plaintiff's action may be cut off entirely if a literal meaning is to be given to the words. The deduction is that the parties cannot have meant what they said in the clause under consideration, but must have meant some thing else, which they did not say.

We cannot assent to this line of reasoning. It does violence to plain words. It smacks too strongly of making a contract which the parties did not make. It construes where

there is no room for construction. Plain, unambiguous words which can have but one meaning are not subject ⁸² to construction. "Twelve months next after the fire" has one certain meaning, and but one. It can have no other. It may well be that the insurer may by his acts waive the limitation, or estop himself from insisting on it, as held in the cases of *Killips v. Putnam F. Ins. Co.*, 28 Wis. 472, 9 Am. Rep. 506, *Black v. Winneshiek Ins. Co.*, 31 Wis. 74, and *Thompson v. Phenix Ins. Co.*, 136 U. S. 287; but the invocation of this principle does no violence to the contract of the parties. There is no element of estoppel present here, however. The defendant company have done nothing which has induced the insured to suspend proceedings or delay his action. They notified him at once on the receipt of his proofs that they denied liability. They did not require him to do any thing. He had nearly ten months in which to bring his suit. By failing to do so he must be held to be barred by his contract.

The provision of section 1975 of the Revised Statutes, to the effect that no insurance policy shall contain a provision that no action or suit shall be brought thereon, is not applicable, because the clause under consideration is plainly not such a provision.

By the COURT. Judgment affirmed.

INSURANCE—LIMITATION OF ACTION ON POLICY.—Where a policy of fire insurance contains a stipulation that no action upon the policy shall be sustained unless commenced within six months after the time the fire shall have occurred, the period of limitation begins to run from the date of the fire, although the policy also provides that no loss shall become due and payable until proof of loss is made and examined into by the insurance company: *State Ins. Co. v. Meesman*, 2 Wash. 459; 26 Am. St. Rep. 870, and extended note.

PIERSTOFF v. JORGES.

[86 WISCONSIN, 128.]

JUDGMENTS—PLEADING—"DULY GIVEN OR MADE."—Under a statute providing that in pleading a judgment of a court of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment may be stated to have been duly given or made, an allegation that plaintiff recovered a judgment against defendant, and that it was duly docketed, is equivalent to an allegation that such judgment was "duly given or made."

PLEADING—ISSUANCE OF EXECUTION.—An allegation in a complaint that on a certain day execution was in due form issued upon a certain judgment
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to the sheriff, and duly returned by said sheriff wholly unsatisfied, sufficiently shows that legal execution has been issued on such judgment and returned unsatisfied.

PLEADING—REMEDY AT LAW—DEMURRER ORE TENUS.—When the subject matter of an action is of equitable cognizance, a demurrer *ore tenus* does not go to the point that the plaintiff has an adequate remedy at law, but only raises the question whether the complaint states a cause of action in equity.

REMEDY AT LAW—ESTOPPEL.—The mere fact that one has a remedy at law is not enough to bar him from proceeding in equity, even when the question is properly raised by the pleadings, unless such remedy is an adequate remedy.

CREDITORS' BILL—RIGHT TO MAINTAIN.—When a judgment debtor has fraudulently transferred personal property, and the fraudulent transferee has collected and appropriated to his own use money from the sale of part of such property, the judgment creditor may, after the return of an execution unsatisfied, maintain a creditor's bill in equity, though part of such property is yet in the possession of the fraudulent vendee, and might be levied upon.

CREDITOR'S BILL TO COLLECT BASTARDY JUDGMENT.—A creditor's bill may be maintained in equity to collect a judgment recovered by a plaintiff in bastardy proceedings against the father of her child, after she has resorted to and exhausted the specific remedy given by statute for the collection of such judgment without being able to make it available at law.

CREDITOR'S BILL.—THE NATURE, PURPOSE, AND SCOPE of a creditor's bill is merely to bring into exercise the equitable powers of the court to enforce the satisfaction of a judgment by means of an equitable execution, because execution at law cannot be had.

CREDITOR'S BILL—ATTACK ON FRAUDULENT CONVEYANCE.—In a suit by creditor's bill to collect a judgment recovered by a mother in bastardy proceedings against the father of her child, she may attack conveyances, made by him prior to the recovery of such judgment, on the ground that they were made to hinder, delay, and defraud her in the collection of any judgment which she might recover.

CREDITOR'S BILL. Plaintiff recovered a judgment in bastardy proceedings against the defendant, Julius M. Jorge, for the recovery of two hundred and fifty dollars, and certain yearly payments thereafter. Said defendant failed to comply with such judgment, was committed to the county jail, and subsequently duly discharged. Afterwards, executions were duly issued upon said judgment, and duly returned by the sheriff wholly unsatisfied. A few days before said judgment was rendered, the defendant, Julius, transferred to his father, Henry Jorge, a stallion, two colts, and a number of accounts, being all the property then owned by said Julius exempt from sale under execution. After the return of the executions unsatisfied, plaintiff filed his creditor's bill, alleging the facts above stated, and that the transfer was made to hinder, delay,

and defraud the creditors of said Julius, and particularly said plaintiff, and prayed that "such sale be set aside, and declared null and void, and that the defendants be adjudged to account for all moneys collected by them, or either of them, upon the accounts and demands mentioned, and for the proceeds of the sale of any of said property, and that the same be paid over to a receiver, and be applied in payment of said judgment. Defendants answered by general denial. Plaintiff recovered judgment and defendants appealed.

H. W. Chynoweth, for the appellants.

Erdall and Swansen and John M. Olin, for the respondent.

¹³³ CASSODAY, J. There is no question but what the municipal court had jurisdiction of the bastardy proceeding against the defendant Julius: Rev. Stats., sec. 2515. That court is made by statute a court of record, with a seal: Rev. Stats., sec. 2515. And the general provisions of law which were in force relative to circuit courts and the actions and proceedings therein, unless inapplicable, and the rules of practice for ¹³⁴ circuit courts, are by the statute made applicable to such municipal court; and its rules of practice and proceedings are thereby required to conform, as near as practicable, to the rules and practice of the circuit courts: Rev. Stats., sec. 2516. Upon the trial of such cause, the issue is whether the accused is guilty or not guilty; and if found guilty, he is thereupon to be adjudged the father of the child, and to stand chargeable with its future maintenance in such sum and in such manner as the court directs, and also for all expenses incurred by the mother for the lying-in and attendance of her during her sickness, and also for the care and support of the child from the time of its birth, and for the costs of the prosecution, as ascertained and fixed by the court and inserted in the judgment: Rev. Stats., sec. 1535. If such father, upon the rendition of such judgment, fail to give bond as required by the statute, then he must be committed to the county jail until he complies with and performs such judgment or is otherwise discharged according to law: Rev. Stats., sec. 1536. After such father has been so imprisoned for ninety days he may, pursuant to the statute, be discharged according to law: Rev. Stats., sec. 1537. Upon being so discharged from such imprisonment, the court may, on motion of the mother of the child, from time to time, order execution to issue against such father for such sum as may at any time

become due thereon and remain unpaid: Rev. Stats., sec. 1538. Such are some of the provisions of the statutes under which it is claimed that judgment in such bastardy proceeding was rendered against the defendant Julius, and upon which he was so committed to jail and discharged, and thereupon two such executions issued thereon against him, and were, respectively, returned wholly unsatisfied before the commencement of this action.

1. Upon the trial, counsel for the defendant objected to any evidence under the complaint, and he now contends that the complaint is fatally defective in not alleging a ¹³⁵ valid judgment in the bastardy proceeding. The statute provides, in effect, that in pleading a judgment of a court of special jurisdiction it shall not be necessary to state the facts conferring jurisdiction, but such judgment may be stated to have been duly given or made, and that if such allegation be controverted the party pleading shall be bound to establish on the trial the facts conferring jurisdiction: Rev. Stats., sec. 2673. Here the complaint alleges, in effect, that on the day named "in an action for bastardy, in which the above-named plaintiff was the complaining witness, the said Rosetta A. Pierstoff recovered a judgment in the municipal court for Dane county against the defendant, Julius M. Jorge, in which it was adjudged" as mentioned in the foregoing statement, and that on the day named "said judgment was duly docketed by the clerk of said municipal court." Such allegations are not denied by the answer of either of the defendants, nor any one of them. On the contrary, such allegations are inferentially admitted, by referring to "said judgment" as an existing, valid judgment. Such being the state of the record, we cannot hold the complaint defective in the particular mentioned. On the contrary, we think the allegation quoted is equivalent to stating that such judgment had been "duly given or made."

2. The objection that the complaint does not show that a legal execution had been issued on the judgment, and returned unsatisfied, is equally untenable. It is alleged that upon the day named "an execution was, in due form of law, issued against said defendant, Julius M. Jorge, upon said judgment, to the sheriff," and "that said execution was duly returned by said sheriff . . . wholly unsatisfied."

3. It is contended that the plaintiff had an adequate remedy at law. But no such issue is raised by the answer. Counsel contends that his objection to any evidence under

¹³⁶ the complaint did raise the question, and in support of such contention he cites *Trustees of Kilbourn Lodge v. Kilbourn*, 74 Wis. 452; *Mackey v. Michelstetter*, 77 Wis. 210. But in each of those cases the question was raised by regular demurrer. This court has repeatedly held that "where the subject matter of an action is of equitable cognizance, a demurrer *ore tenus* does not go to the point that the plaintiff has an adequate remedy at law, but only raises the question whether the complaint states a cause of action in equity": *Sherry v. Smith*, 72 Wis. 339; *Becker v. Trickel*, 80 Wis. 484.

4. But counsel for the defendants contends that the cause of action alleged is not of equitable cognizance. The claim is that either of the executions might have been levied on the property still in the possession of the fraudulent vendee, Henry Jorge. But the sale from Julius to Henry was not an absolute nullity. It was binding between the parties, and, at most, voidable at the instance of those having debts or rights of action against Julius. The return of the sheriff was presumptive evidence that none of the property so held by Henry belonged to Julius: Rev. Stats., secs. 3029, 3780. If the sheriff had any reasonable doubt as to the ownership of such property, or as to its liability to be taken on the execution, then he was not obliged to levy thereon unless the plaintiff indemnified him against any damages he might sustain by reason of such levy: Rev. Stats., sec. 2986. Possibly, and we may say probably, the plaintiff was unable to give such security. Was she thereby prevented from enforcing her judgment? The mere fact that a party has a remedy at law is not enough to bar him from proceeding in equity, even when the question is properly raised by the pleadings, unless such remedy is an adequate remedy. The statute declares that "whenever any execution against the property of any judgment debtor shall have been issued upon a judgment for the payment of ¹³⁷ money, and shall have been returned unsatisfied in whole or in part, the judgment creditor may commence an action against such judgment debtor, and any other person, to compel the discovery of any property or thing in action, belonging to such judgment debtor, and of any property, money, or thing in action due or held in trust for him, and to prevent the transfer" thereof, etc.: Rev. Stats., sec. 3029. This statute, upon the return of such executions wholly unsatisfied, seems to have given to the plaintiff the right to file and prosecute this creditor's bill, notwithstanding the fact

that the stallion still remained in the open possession of the defendant Henry. But, even if this were otherwise, yet since it stands confessed that the fraudulent vendee, Henry Jorge, collected and appropriated to his own use one hundred and five dollars on the accounts, and received and appropriated to his own use fifty dollars on the sale by him of the two colts, there can be no serious doubt but that the plaintiff was authorized to proceed by this creditor's bill to reach such things in action; and hence, in any view, the case was to that extent one of equitable cognizance, and, the court of equity having taken cognizance of the cause for that purpose, it was justified in going further and granting relief as to the stallion: *Peck v. School Dist.*, 21 Wis. 516; *Hebard v. Ashland County*, 55 Wis. 145; *Sherry v. Smith*, 72 Wis. 342; *Crumph v. Ingersoll*, 47 Minn. 179.

5. It is contended that a resort to equity to collect a bastardy judgment is not permissible; that in such a case the two parties are equally at fault; and that equity will not help the one at the expense of the other. The answer is, that the statute gives to the mother of the child a right of action against the father of the child for her own benefit and protection: *Baker v. State*, 65 Wis. 54. The judgment is manifestly based upon a statutory right of action, and must therefore, until satisfied, be regarded as the conclusive evidence of an existing indebtedness.

¹³⁸ 6. The able counsel for the defendant goes still further, and contends that a bill in equity will not lie where, as here, the statute has created a right and given a remedy without providing for a bill in equity; and he cites, in support of such contention, cases from this as well as other courts. These cases are to the effect that, where a new right is given, and a specific remedy provided by the same statute, such remedy is exclusive: *Arnet v. Milwaukee M. M. Ins. Co.*, 22 Wis. 521; *Hall v. Hinckley*, 32 Wis. 368; *Smith v. Lockwood*, 34 Wis. 72. Had the plaintiff attempted to enforce her claim against the father of her child by an ordinary action instead of proceedings in bastardy, the rule thus invoked would have been applicable. But here she resorted to the specific remedy given by statute, and has exhausted that remedy without being able to make it available at law. The nature, purpose, and scope of a creditor's bill has frequently been considered by this court: *Clark v. Bergenthal*, 52 Wis. 103; *Smith v. Weeks*, 60 Wis. 94; *Ahlhauser v. Doud*, 74 Wis. 400; *Gilbert*

v. *Stockman*, 81 Wis. 602; 29 Am. St. Rep. 922; *Bragg v. Gaynor*, 85 Wis. 468. This creditor's bill is merely to bring into exercise the equitable powers of the court to enforce and make effectual the remedy thus given by statute. "The ground of the jurisdiction, therefore, is, not that of a lien or charge arising by virtue of the judgment itself, but of an equity to enforce satisfaction of the judgment by means of an equitable execution": *Freedman's S. & T. Co. v. Earle*, 110 U. S. 716. "Equitable execution," said Bowen, L. J., "is equitable relief, which the court gives because execution at law cannot be had": *Atkins v. Shephard*, L. R. 43 Ch. Div. 137, where it was held that "what is commonly called equitable execution is not in fact execution, but equitable relief, which is granted because there is a hindrance in the way of execution at law." In *Barker v. Dayton*, 28 Wis. 367, an execution for alimony had been returned wholly unsatisfied. ¹³⁹ Nevertheless, it was held, in effect, that supplementary proceedings, in their nature equitable, were available to enforce collection of the judgment, as in other cases: *Smith v. Weeks*, 60 Wis. 100. So an equitable action may be maintained to enforce a judgment for alimony: *Keyes v. Scanlan*, 63 Wis. 345. "Whenever a general rule as to property or personal rights, or injuries to either, is established by state legislation," said Mr. Justice Field, "its enforcement by a federal court in a case between proper parties is a matter of course, and the jurisdiction of the court, in such case, is not subject to state limitation": *Railway Co. v. Whitton*, 13 Wall. 286. This was so held where the state statute created a new right of action, and then undertook to limit the remedy to the state court: See, also, *Osborn v. Ordinary of Harris County*, 17 Ga. 123; 63 Am. Dec. 230. It would hardly be contended that a judgment recovered under such a statute could not be enforced by creditor's bill.

7. Counsel, moreover, contends that the plaintiff could in no event be regarded as a creditor of the defendant Julius until she had recovered her judgment, and that she did not recover that until four days after the transfers mentioned, and hence that the plaintiff is in no condition to question the validity of such transfers. But the statute expressly avoids every conveyance or assignment of any estate or interest in goods or things in action, made with the intent to hinder, delay, or defraud creditors or other persons of their lawful actions, debts, or demands, as against the person so hindered, delayed, or defrauded: Rev. Stats., sec. 2320. Thus, convey-

ances made by a man, a short time before his marriage, in fraud of his prospective wife's right of dower, are voidable under this statute: *Jones v. Jones*, 64 Wis. 301; 71 Wis. 513.

We find no error in the record.

By the COURT. The judgment of the circuit court is affirmed.

CREDITOR'S SUIT—UNSATISFIED EXECUTION—PLEADING.—To entitle a judgment creditor to relief in equity to obtain payment of his judgment on the ground that he has exhausted his remedy at law, he must by his bill show affirmatively that he has issued execution to the county where defendant resided, which execution was returned unsatisfied, or he must show a legal excuse for not doing so: *Reed v. Wheaton*, 7 Paige, 663; 34 Am. Dec. 366, and note; *Beck v. Burdett*, 1 Paige, 305; 19 Am. Dec. 436; *Vasser v. Henderson*, 40 Miss. 519; 90 Am. Dec. 351; *Baxter v. Moses*, 77 Me. 465; 52 Am. Rep. 783. See the extended note to *Massey v. Gorton*, 90 Am. Dec. 297.

EQUITY—NO RELIEF WHERE REMEDY AT LAW.—Equitable relief will not always be granted as a matter of course when the law side of the court is open for legal redress: *Turner v. Hart*, 71 Mich. 128; 15 Am. St. Rep. 243. To exclude the jurisdiction of equity, the legal remedy must be in all respects as satisfactory as the relief furnished by a court of equity: *Fitzmaurice v. Mosier*, 116 Ind. 363; 9 Am. St. Rep. 854. The remedy at law is exclusive only when the rights of the parties spring from legal duties and obligations: *Godfrey v. White*, 60 Mich. 443; 1 Am. St. Rep. 537. The general rule is that equity will not interfere where the remedy at law is full and complete: *Sherman v. Clark*, 4 Nev. 138; 97 Am. Dec. 516, and note; *Poyer v. Des Plaines*, 123 Ill. 111; 5 Am. St. Rep. 494.

CREDITOR'S SUIT TO REACH PROPERTY OF JUDGMENT DEBTOR FRAUDULENTLY CONVEYED: See *Bomar v. Means*, 37 S. C. 520; 34 Am. St. Rep. 772, and note; *Gilbert v. Stockton*, 81 Wis. 602; 29 Am. St. Rep. 922, and note; and especially the extended note to *Massey v. Gorton*, 90 Am. Dec. 289, where the subject is fully discussed.

SPAULDING v. STUBBINGS.

[86 WISCONSIN, 255.]

PARTNERSHIP—WHAT CONSTITUTES.—A partnership is the contract relation subsisting between persons who have combined their property, labor, and skill in an enterprise or business, as principals, for the purpose of joint profit.

PARTNERSHIP—WHAT CONSTITUTES—DEATH OF PARTNER AS AFFECTING LIABILITY.—A contract between two parties reciting that one has loaned the other a certain sum of money which he agrees to repay in five years with the highest legal rate of interest annually, and also reciting that the borrower is engaged in carrying on a certain business, and obligating him to keep correct account books, open at all times to the inspection of the other, and to pay the latter one-half of the net profits,

constitutes, as between the parties a contract of partnership, especially if the lender thereafter makes further advances, and to some extent assumes active management of the business; and the liability of the lender as a partner is not terminated by the death of the borrower, when the business is continued by his administrator with the full knowledge and consent of the lender who continues to make advances and carry it on.

JUDGMENT IN ACTION ON ACCOUNT.—In an action upon an account, and upon a note given for part thereof, and the note is in court, the defendants are not prejudiced by the fact that the findings and judgment rest upon the account rather than upon the note, especially when no interest is allowed.

ACTION on an account and upon a note. W. H. Stubbings and John O'Connor carried on a business under a contract entered into between them. John O'Connor died, and his administrator continued to carry on the business under such contract. This action is against Stubbings and George O'Connor, administrator of said John, to recover an unpaid balance for supplies furnished him, and also upon a note given by him as administrator for a portion of such supplies. The action was brought on the theory that Stubbings was a partner with John O'Connor, and that his liability as such continued after the death of said John. The answer denied the partnership. Judgment for plaintiff against George O'Connor and Stubbings, and the latter appealed.

Alban and Barnes and G. Bouck, for the appellant.

L. J. Billings and Miller and McCormick, for the respondent.

261 LYON, C. J. If defendant Stubbings is liable in this action, he is so liable because he was a partner with John O'Connor, during his lifetime, in the Eagle river business, and allowed the business to be continued on the same basis by the administrators of John O'Connor's estate after his death. We have no case here for the application of the doctrine of estoppel against Stubbings, because he held himself out to plaintiff as a partner in the business. The plaintiff testified he was told by John O'Connor, just before his death, that Stubbings had an interest in the business, and that was all. If plaintiff was a competent witness to give this testimony (which counsel for Stubbings deny) it fails to prove that Stubbings held himself out to plaintiff as a partner with O'Connor in the Eagle river business. It does not appear that plaintiff took the trouble to inquire of Stubbings or any other person what that interest was, if it existed, or to

ascertain whether the business was continued ²⁶² on the same basis after the death of John O'Connor; and there is no satisfactory proof that plaintiff relied upon the fact that Stubbings was a partner in the business when he gave credit to John O'Connor, and, after his death, to his administrators. Hence the first and principal question is, were John O'Connor and Stubbings partners *inter se* in the Eagle river business before and at the time of the death of John O'Connor?

Among the numerous definitions of a "partnership" to be found in the treatises on that subject, many of which definitions are collected in 1 Lindley on Partnership, 2, and in 17 American and English Encyclopædia of Law, 828, we think the definition formulated by Mr. Bates in his late work on that subject is as accurate and satisfactory as any we have seen. This definition seems to be preferred by the learned writer of the article entitled "Partnership" in such encyclopædia. It is as follows: "A partnership is the contract relation subsisting between persons who have combined their property, labor, and skill in an enterprise or business, as principals, for the purpose of joint profit": 1 Bates on Partnership, sec. 1. It is said by Mr. Lindley that "partnership, although often called a contract, is in truth the result of a contract; the relations which subsist between persons who have agreed to share the profits of some business, rather than the agreement to share such profits": 1 Lindley on Partnership, 2. Hence, it is not essential to the existence of a partnership that it be so denominated in the contract of the parties; nor is it necessarily fatal thereto if the parties declare in such contract that they do not intend to become partners. The real inquiry always is, have the parties by their contract combined their property, labor, or skill in an enterprise or business, as principals, for the purpose of joint profit? If they have done so, they are partners in that business or enterprise, no matter how earnestly they may protest they are not, or how distant the formation of a partnership was ²⁶³ from their minds. The terms of their contract given, the law steps in and declares what their relations are to the enterprise or business and to each other.

The learned counsel for Stubbings contends that only the agreement of April 10, 1889, can be considered in determining the question of partnership. This alone of the two agreements above mentioned is set out and relied upon in the complaint to establish a partnership between Stubbings and John

O'Connor. While we think the same effect should be given to both contracts, construed together, that should be given to the contract of April 10, 1889, excluding the other, we are willing to adopt the view of counsel, and confine ourselves to giving construction to the latest contract. That instrument in form fixes the amount of money loaned by Stubbings to John O'Connor at the sum of fourteen thousand six hundred and eleven dollars and fifty cents, and binds the latter to repay it in five years, with ten per cent interest, payable annually. The instrument recites that O'Connor is engaged in carrying on a general merchandise business in Eagle river and provides that he shall pay Stubbings one-half of the net profits of such business; that O'Connor shall keep correct account books of the business, which shall be open at all times to the inspection of Stubbings or his agent; and that during five years the stock of goods in the business shall not be sold in bulk without the consent of both parties thereto. It will be observed that this agreement does not specify what O'Connor had done or should do with the fourteen thousand six hundred and eleven dollars and fifty cents, nor the consideration for the stipulation to give Stubbings one-half of the net profits of the business. Such share of the profits could not have been given as additional interest, because the agreement provided for paying him the highest legal rate of interest of this state, independently of the profits. Neither was it for services in the business, for Stubbings did not stipulate to perform services therein. The conclusion ²⁶⁴ is almost irresistible that it was inserted to fix the proportionate share of Stubbings in the business.

It will also be observed that in the contract of April 10th Stubbings did not agree to make any further loans or advances to O'Connor; neither does it contain any provision that O'Connor should be responsible therefor should any further advances be made. Stubbings made further advances, however, for the benefit of the business, and it does not appear that any time was fixed for repayment thereof, or that he demanded any voucher or security therefor. It is not reasonable to believe that he would thus have parted with his money if he was not interested with O'Connor in the business as a principal.

Moreover, the letters of Stubbings in evidence show that the proposition to start the business at Eagle river was first made by him; that he purchased much stock for the store; that he

advised, if he did not dictate, of whom O'Connor should make purchases, as well as prices and terms; that he arranged for credits; and that he carefully watched and freely interfered with all the details of the business, so far as he could obtain knowledge of those details by persistent requests to the O'Connors to furnish him detailed information thereof. In short, he exercised an influence in, and assumed a control over, the management of the business (which was acquiesced in by the O'Connors) entirely incompatible with the idea that he was merely a creditor of O'Connor for the amount of his advances and interest thereon, which can only be satisfactorily accounted for on the theory that he was handling and directing his own business.

The foregoing considerations impel our minds to the conclusion that under the contract of April 10th, Stubbings and John O'Connor combined their property, labor, and skill, in the Eagle river business as principals, and of course ²⁶⁵ they did so for their joint profit, for the contract gives each one-half the net profits. This makes them partners in the business, within the rule above stated. The contract is strikingly like that under consideration in *Rosenfield v. Haight*, 53 Wis. 260, 40 Am. Rep. 770, which this court held created a partnership relation between the parties to it.

The fact that the business was conducted in the name of John O'Connor, and, after his death, in the name of the administrator of his estate, and the further fact that in Stubbings' letters to each of them the business was usually referred to as "your business," are not significant, for it appears that, for reasons satisfactory to himself, Stubbings desired that his connection with the business should be kept secret.

The finding that the business was continued after the death of John O'Connor in the name of his administrators, or one of them, with full knowledge and permission of Stubbings, and was conducted in all respects as before, without any notice to the contrary or adjustment of the partnership business, and that Stubbings continued to make advances to carry it on, are fully sustained by the proofs. It requires no argument to show that in such case the liability of Stubbings as a partner is continued.

The findings of the court are criticised because they ignore the note sued upon and go upon the open account of plaintiff alone. The note was given for a part of such account, but it is not a payment thereof. The note was brought into

court, and the defendants are not prejudiced because the findings and judgment rest upon the original account rather than upon the note. A computation shows that no interest was allowed on the account; hence the judgment is more favorable to defendants than it would have been had it been upon the note.

By the COURT. The judgment of the circuit court is affirmed.

PARTNERSHIP—DEFINITION.—A partnership is a contract of two or more competent persons to place their money, effects, labor, and skill, or some of them, in lawful commerce or business, and to divide the profits and bear the loss in certain proportions: *Goldsmith v. Eichold*, 94 Ala. 116; 33 Am. St. Rep. 97, and note with the cases collected.

PARTNERSHIP—LOANING MONEY AND SHARING PROFITS—WHETHER CONSTITUTES.—The loan of money to be invested in trade, the borrower and lender to share the net profits, is not a partnership: *Culley v. Edwards*, 44 Ark. 423; 51 Am. Rep. 614; *Boston etc. Smelting Co. v. Smith*, 13 R. I. 27; 43 Am. Rep. 3. A loan of money to be used in the business of a firm, with an agreement that the lender shall share in the profits, renders him *per se* a partner as to the creditors of the firm: *Leggett v. Hyde*, 58 N. Y. 272; 17 Am. Rep. 244. See, further, on this question the notes to *Richardson v. Hughitt*, 32 Am. Rep. 271; *Sodiker v. Applegate*, 49 Am. Rep. 255; and the extended note to *Clifton v. Howard*, 58 Am. Rep. 100.

LARSON v. AULTMAN AND TAYLOR COMPANY.

[86 WISCONSIN, 231.]

FOREIGN CORPORATIONS—STATUTE OF LIMITATIONS.—A foreign corporation is a person "out of the state," and cannot avail itself of the statute of limitations.

SALES—DEFECTS IN MACHINERY—CONFLICT IN EVIDENCE.—In an action to recover for defects in machinery purchased, it is error to charge the jury that the purchaser having purchased with full opportunity for inspection cannot recover, especially when the evidence is conflicting as to whether the defects were patent or not.

SALES—WARRANTY BY AGENT.—A purchaser of machinery may recover from the seller for a breach of warranty by the agent of the latter, upon proof of a general custom amongst agents selling such machinery to warrant it.

SALES—BREACH OF WARRANTY—OFFER TO RETURN.—If the capacity of machinery warranted by the seller is unknown to the purchaser at the time of the sale, and such purchaser buys, relying upon the warranty, he is not precluded from recovering his legitimate damages for a breach of such warranty, although he fails to return, or offer to return, the machinery upon discovery of its want of capacity, and fails to notify the seller thereof.

ACTION to recover damages for a breach of warranty in the sale of sawmill machinery. Judgment for plaintiff, and both parties appealed.

Wickham and Farr, for the plaintiff.

W. P. Bartlett, for the defendant.

283 CASSODAY, J. It is conceded that the defendant is a corporation created and organized under the laws of Ohio. It exists only in contemplation of, and by force of, the law of that state. Since such law has, of itself, no extraterritorial force, the corporation cannot migrate to another state, but **284** must dwell in the state of its creation: *Bank of Augusta v. Earle*, 13 Pet. 588; *Ohio etc. R. R. Co. v. Wheeler*, 1 Black, 286; *Shaw v. Quincy M. Co.*, 145 U. S. 449, 450. While it can only live and have its being in that state, yet its residence there creates no insuperable objection to its power to contract in other states, and having its legal existence recognized in such other states: *Supra*. A suit against a corporation in a court of the United States is regarded as brought against its stockholders, all of whom are, for the purposes of jurisdiction, conclusively presumed to be citizens of the state in which the corporation was created: *Muller v. Dows*, 94 U. S. 444; *Railway Co. v. Whitton*, 13 Wall. 270; *Ohio etc. R. R. Co. v. Wheeler*, 1 Black, 286. Foreign corporations are not compelled to do business in this state. If they voluntarily choose to do so, however, they must submit to such conditions and restrictions as the legislature has seen fit to impose: *State v. United States Mut. Acc. Assn.*, 67 Wis. 629; *Stanhilber v. Mutual M. Ins. Co.*, 76 Wis. 291; *Paul v. Virginia*, 8 Wall. 181; *Philadelphia Fire Assn. v. New York*, 119 U. S. 117; *Fritts v. Palmer*, 132 U. S. 282. The defendant, by voluntarily doing business in this state, thereby voluntarily submitted itself to the laws of this state: *Supra*.

The learned counsel for the defendant contends that the plaintiff's cause of action is barred by the six years' limitation prescribed by section 4222 of the Revised Statutes, as pleaded in the answer. Among the exceptions to that statute is the one which declares that "if, when the cause of action shall accrue against any person, he shall be out of this state, such action may be commenced, within the terms herein respectively limited, after such person shall return to, or remove to, this state": Rev. Stats., sec. 4231. The words "if . . . he shall be out of this state," found in the exception thus quoted, have been

construed by this court to apply to the mere temporary absence of a resident of the state: *Parker v. Kelly*, 61 Wis. 285 552. The opinion of Mr. Justice Orton, in that case, and the adjudications there cited, seem to dispose of the question suggested in the case at bar, if the defendant is subject to the same rule as a personal defendant. Speaking of the clause quoted, as found in the New York Code, Mr. Chief Justice Fuller, in a recent case, and commenting upon the decisions in that state, in effect said that as to the statute of limitation there were two exceptions to its operation, and that one was "where the debtor was absent from the state when the cause of action accrued," and that under that exception mere "absence was sufficient to avert the bar, because the statute did not commence to run until the return of the debtor into the state, and such return . . . must be open and notorious, so that a creditor might, with reasonable diligence, find his debtor and serve him with process": *Barney v. Oelrichs*, 138 U. S. 534, citing *Engel v. Fischer*, 102 N. Y. 404; 55 Am. Rep. 818, where numerous other cases are cited. In a more recent case, Mr. Justice Gray, speaking for the whole court, in respect to a similar clause in a Kansas statute, said: "It was, therefore, rightly held by the circuit court that the statute of limitations did not run while the debtor was personally absent from the state, notwithstanding that he continued to have a usual place of residence in the state, where service of a summons could be made on him": *Bauserman v. Blunt*, 147 U. S. 657. In that case it was held that the construction given by the supreme court of a state to a statute of limitations of the state would be followed by that court: *Sanborn v. Perry*, 86 Wis. 361.

But counsel further contends that a foreign corporation is not a nonresident, in the sense that it cannot plead the statute of limitations, and he cites adjudications to that effect. In *Tioga R. R. Co. v. Blossburg etc. R. R. Co.*, 20 Wall. 137, it was held: "The highest courts of New York, construing the statutes of limitations of that state, have decided that a foreign corporation cannot avail itself of them; 286 and this, notwithstanding such corporation was the lessee of a railroad in New York, and had property within the state, and a managing agent residing and keeping an office of the company": *Bauserman v. Blunt*, 147 U. S. 654. See *Thompson v. Tioga R. R. Co.*, 36 Barb. 79; *Olcott v. Tioga R. R. Co.*, 20 N. Y. 210; 75 Am. Dec. 393; *Rathburn v. Northern Cent. Ry. Co.*, 50 N. Y.

656. Under our statutes, the word "person," as used in the clause quoted from section 4231 of the Revised Statutes, "may extend and be applied to bodies politic and corporate, as well as to individuals": Rev. Stats., sec. 4971, subd. 12.

Such being the law applicable, it is obvious that the defendant was "out of the state" when the plaintiff's cause of action accrued, within the meaning of our statutes. We must hold that the plaintiff's cause of action is not barred by the statute of limitations pleaded. It follows that the exceptions of the defendant must be overruled, and that the judgment, in so far as it is questioned on the defendant's appeal, must be affirmed.

The question recurs whether any of the errors assigned in behalf of the plaintiff are available. The evidence on the part of the plaintiff tends to prove, in effect, that the machinery purchased by him of the defendant consisted of the tracks, or a portion of them, the carriage with trucks, three head blocks with set works, a rack and pinion feed, a double rotary with boxes to it, a top-saw rig with belts, intermediate pulleys, and traction pulleys, and shaft with pinion on, one drive belt and two or three smaller belts, and two saws; that both the rotary and top saws were used for sawing logs, but the top saw was only to be used when the logs were so large that they could not be sawed with the other; that such other saw was to be a fifty-two inch Henry Disston saw, six by seven gauge, scant in thickness, fifty-two teeth; that the defendant's agent warranted the mill to cut from twenty-five to thirty-five thousand feet per day; that it was customary for local agents having the ²⁸⁷ sale of such machinery to warrant the same; that most of the mill or machinery, including the arbor, was present when the plaintiff made the purchase, July 31, 1884; that the double rotary, the carriage, and what went with it, except a pinion, were not there; that the machinery so present appeared to be all right; that the machinery was put in the mill in October; that the saw came about the middle of November; that the mill started about November 20, 1884; that it commenced manufacturing lumber about December 1, 1884; that it would not or could not manufacture heavy lumber; that some thing was always giving out; that the arbor was right-handed instead of left-handed, that is to say, the thread, or screw, was cut the wrong way, so that the motion of the saw would loosen it instead of making it more tight, as it should; that the temper was out of the saw, and that

could be seen at once; that the second saw had a flaw in it, and the teeth kept breaking; that before December 24, 1884, the plaintiff notified the defendant's agent that the saw would not work, but got no reply; that December 27, 1884, the plaintiff returned the saw to the agent of the defendant; that he ordered and received another saw of the defendant, and that that was defective; that he was compelled to have the arbor changed in the particular mentioned; that the bearings of the trucks were cast iron instead of steel, and failed to work properly; that the plaintiff thereupon inquired of the defendant the price of a new set, and, on being informed, bought a set cheaper elsewhere; that he had to put wider pulleys on the shaft of the feed works, and get new belts for the same; that one pinion was all right, but the other was too small, and had to be returned with the saw; that the timber of the carriage was pine, and painted, and the fact that it was not hardwood was not, for a time, observed; that the plaintiff had in the mill other machinery which he could not or did not purchase of the defendant, including a rack and 288 pinion feed, edgers, and trimmers; that after the mill was repaired and the defects remedied, the mill was incapable of manufacturing, on an average, more than ten thousand feet of lumber per day. Such is a general outline of the testimony on the part of the plaintiff. The essentials of that testimony are flatly contradicted by evidence on the part of the defendant, much of which is strongly corroborated by circumstances of a convincing character.

The court submitted the case to the jury on the theory that there was an implied warranty that the saw and arbor and pulleys, and some other parts of the machinery, were reasonably fit for the purpose for which they were purchased, unless the plaintiff knew of such defects at the time of purchase, and the verdict is based upon the defects so submitted. The court, among other things, charged the jury to the effect that it appeared from the evidence that the plaintiff's son was an experienced man in the operation of sawmills of this character; that all the parts, except the large saw, were at the time of the purchase open to inspection and examination by the plaintiff, and his son, who was acting for him, and that all such defects were patent—that is, they were open and visible, and would readily have been discovered by an experienced man in the business upon inspection; that in such cases the law is well settled that the plaintiff is presumed

to have purchased with knowledge, unless there was an express warranty by the defendant that the machinery was different in kind and material from what was apparent upon mere inspection; that in this case there was no such express warranty—that is to say, there was no evidence to show that the mill was warranted to be of any different material or make than what it actually was. In the portions of the charge referred to, the learned trial judge was manifestly seeking to follow, and substantially did follow, the principles sanctioned by this court in *Locke v. Williamson*, 40 Wis. 377; *Morehouse v. Comstock*, ²⁸⁹ 42 Wis. 626; *Olson v. Mayer*, 56 Wis. 551. As to such parts of the machinery as had no defects except such as were patent, the portion of the charge mentioned may be unobjectionable; but it may be doubtful whether the undisputed evidence was such as to justify the court in taking the question of latent defects and waiver from the jury, as to all the machinery except a large saw. The court did, however, take such question from the jury, and in effect expressly charged that the plaintiff having purchased the mill, as he did, with full opportunity for inspection, and having kept and used it for a considerable time after he had actual knowledge of its defective character, if it was defective, without complaint or offering to return it in the condition in which it was, he could not recover damages on account thereof. Under the evidence, we think this was misleading, and hence error.

The rulings of the court on the admission of evidence are upon the theory that the defendant's local agent who sold the machinery to the plaintiff had no authority to expressly warrant the same or any part of it; and a portion of the charge is to the effect that, under the testimony, there were great doubts whether the defendant ever warranted the mill to cut from twenty-five to thirty-five thousand feet of lumber per day, as the evidence tended to prove that the warranty, if made, was that of the agent merely. The rule is settled in this state that an agent employed to sell has no implied power to warrant, unless the sale is one which is usually attended with warranty: *Pickert v. Marston*, 68 Wis. 465; 60 Am. Rep. 876. In the case at bar there is evidence to the effect that it was the general custom of local agents to warrant such machinery when selling it. Such being the law and the evidence, we must hold that such rulings of the court upon the contrary

theory mentioned were erroneous, and that the portion of the charge referred to was misleading.

²⁹⁰ In the same connection the court further said to the jury, in effect, that it appeared from the evidence that the son, at the time of the purchase, expressed doubt as to the ability of the mill to saw the quantity named; that there was no special damage alleged as to the mill's inability to manufacture that quantity; that the testimony was too indefinite and uncertain to hold that it would not; that the number of hours contemplated to constitute a day was not stated, nor whether it would require a change of saws at intervals in the day, nor whether it was to be accomplished in connection with other machinery in the mill, such as edgers, trimmers, and like machinery; that it was common knowledge that the rotary sawmill was but a small part of a sawmill proper, and that the capacity of the mill depended largely upon the entire machinery, the class of logs, location, and experience, quickness, and number of men employed in all its departments. The indefiniteness and uncertainty mentioned may have called, and probably did call, for special instructions to the jury, thus narrowing the question down to just what, if any thing, was covered by the alleged warranty; but they did not, as we think, authorize the judge to determine the question against the plaintiff, as a matter of law. The defendant's alleged warranty as to the capacity of the mill, as presented in the record, must be regarded as only applicable to the mill when operated under favorable circumstances and conditions. If the capacity of the mill was unknown to the plaintiff or his son at the time of the purchase, and the defendant actually warranted such capacity, and the plaintiff made the purchase relying upon the same, and there was a breach of the warranty, as alleged, then we perceive no reason why the plaintiff should be precluded from recovering his legitimate damages therefor, notwithstanding his failure to return, or offer to return, the mill or the defective parts, or to notify the defendant of such defects or want ²⁹¹ of capacity: *Neave v. Arntz*, 56 Wis. 174; *Winkler v. Patten*, 57 Wis. 405; *Vates v. Cornelius*, 59 Wis. 615; *Buffalo B. W. Co. v. Phillips*, 67 Wis. 129; *White v. Stelloh*, 74 Wis. 435; *Barnes v. Burns*, 81 Wis. 232.

As the case must be retried upon a new theory and perhaps new evidence, we do not feel called upon to consider the

important questions which may arise as to the proper measure of damages.

By the COURT. The judgment of the circuit court is reversed on the plaintiff's appeal, and the cause is remanded for a new trial.

LIMITATIONS OF ACTIONS—APPLICATION OF TO FOREIGN CORPORATIONS: See the extended notes to *Clarke v. Bank*, 52 Am. Dec. 256-258, and *Moore v. Armstrong*, 36 Am. Dec. 73. A foreign corporation is a "person" within the meaning of the exceptions in the statute of limitations as to persons absent from the state: *North Missouri R. R. Co. v. Akers*, 4 Kan. 388; 96 Am. Dec. 183. But in *Olcott v. Tioga R. R. Co.*, 20 N. Y. 210, 75 Am. Dec. 393, it was held that the statute of limitations is not available as a defense to an action against a foreign corporation in New York.

SALES—WARRANTY BY AGENT OF VENDOR.—A general agent employed to carry on a business with power to sell also has power to warrant, if it is usual to give a warranty when making a sale in such business: *Edwards v. Dillon*, 147 Ill. 14; 37 Am. St. Rep. 199, and note with the cases collected.

SALES—BREACH OF WARRANTY—DUTY TO RETURN GOODS.—A vendee of goods sold under warranty may retain the goods without giving notice to the vendor of defects therein, and in an action by the vendor for the purchase price may plead breach of warranty for the purpose of recouping damages: *Tacoma Coal Co. v. Bradley*, 2 Wash. 600; 26 Am. St. Rep. 890. Where there is a sale of personal property with an express warranty, the vendee may retain the goods and recoup damages in an action for its breach: *Underwood v. Wolf*, 131 Ill. 425; 19 Am. St. Rep. 40, and note; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260; 16 Am. St. Rep. 753, and note; *Argersinger v. Macnaughton*, 114 N. Y. 535; 11 Am. St. Rep. 687, and note.

CITY OF EAU CLAIRE v. MATZKE.

[86 WISCONSIN, 291.]

INJUNCTIONS—OBSTRUCTIONS IN STREETS.—A mandatory injunction may issue at the suit of a city to compel a lot owner therein to remove his buildings which encroach upon or obstruct a public street.

MUNICIPAL CORPORATIONS—INJUNCTIONS—OBSTRUCTIONS IN STREETS.—A city, in its corporate capacity, may maintain a suit in equity to obtain an injunction to prevent threatened obstructions or serious unlawful injuries to public streets.

L. A. Doolittle, for the appellant.

Wickham and Farr, for the respondent.

291 WINSLOW, J. This is an action in equity, brought by the city, to obtain a mandatory injunction compelling the defendant to remove certain buildings owned and maintained by defendant, and which are alleged to encroach upon a

public street in the city and obstruct a public alley, and ²⁹² which defendant refuses to remove. A general demurrer to the complaint was sustained on the ground that the remedy at law was adequate. It must now be considered as well settled in this state, that a city or village, in its corporate capacity, may maintain an action in equity to prevent threatened obstructions or serious unlawful injuries to public streets: *Waukesha Hygeia Mineral Spring Co. v. Waukesha*, 83 Wis. 475; *Neshkoro v. Nest*, 85 Wis. 126. No good reason is perceived why the equity powers of the court may not also be invoked to compel a restoration of a street unlawfully obstructed or encroached upon. In fact, such actions have been approved by this court in cases of obstructions unlawfully placed in streets by railway companies in building their tracks: *Jamestown v. Chicago etc. R. R. Co.*, 69 Wis. 648; *Oshkosh v. Milwaukee etc. R. R. Co.*, 74 Wis. 534; 17 Am. St. Rep. 175. The principle on which these cases rest applies to an obstruction or an encroachment maintained by a lot owner. In both cases there is an invasion of the public right, and a duty resting on the defendant to remove the unlawful structure. We think the action is properly brought.

By the COURT. Order reversed, and action remanded with directions to overrule the demurrer.

INJUNCTIONS AGAINST OBSTRUCTIONS IN HIGHWAYS.—The permanent obstruction of a public highway in a city is a nuisance, and a court of equity will prevent it at the suit of the municipal authorities: *Reed v. Mayor*, 92 Ala. 339; *Town of Burlington v. Schwartzman*, 52 Conn. 181; 52 Am. Rep. 571, and extended note. A mandatory injunction may issue to compel a railway corporation to put in suitable condition for travel a highway which it has obstructed by the construction of its track: *Oshkosh v. Milwaukee etc. R. R. Co.*, 74 Wis. 534; 17 Am. St. Rep. 175, and note. An injunction will issue to prevent the completion of a threatened obstruction to a public street: *Newell v. Sass*, 142 Ill. 104; but an injunction will not lie to prevent the erection of a building across a public road, if the building had been erected before the commencement of the action: *Gardner v. Stroeover*, 81 Cal. 148. See a further discussion of this question in the notes to *Murdock's case*, 20 Am. Dec. 394; *State v. Berdette*, 38 Am. Rep. 127; and *Julia Building Assn. v. Bell Telephone Co.*, 57 Am. Rep. 410.

NATIONAL DISTILLING COMPANY v. CREAM CITY IMPORTING COMPANY.

[86 WISCONSIN, 352.]

PRACTICE.—IRRELEVANT defense of a character that may embarrass and prejudice the plaintiff in preparing for trial and maintaining his action should be stricken out on motion.

TRADE COMBINATIONS—CONTRACT OF SALE WITH—RECOVERY OF PRICE.—

The fact that a person is a member of an illegal trust or combination, formed for the purpose of acquiring control and a monopoly of the trade in certain goods, does not in law prevent him from selling goods within, or affected by, the provisions of such trust, and recovering their price or value when the illegality of the trust is entirely collateral to the sale.

TRADE COMBINATIONS—CONTRACTS OF SALE WITH—PUBLIC POLICY.—A

contract by which a buyer of certain goods is to receive a rebate on their purchase price, on condition that he purchases for a certain time from an illegal trust or combination or members thereof, does not render a sale of such goods invalid as against public policy and in restraint of trade.

INTERSTATE COMMERCE—SALES WITHIN THE STATE.—When both parties to a sale of goods reside in the same state, the sale is not a transaction of interstate commerce.

TRADE COMBINATIONS—CONTRACT OF SALE WITH—ACTION FOR PRICE—

PLEA IN ABATEMENT.—In an action by a member of an illegal trust or combination to recover the price of goods sold by him, an allegation that such trust is the real party in interest in the action, and that it can only be maintained by it, is fatally defective as a plea in abatement, without an allegation that such trust is a partnership or corporation, and that it, or some of its members other than plaintiff, had an interest in the goods sold or the money to be paid for them, together with a denial of indebtedness to the plaintiff.

PRACTICE—MOTIONS—ERROR IN FAILING TO DETERMINE.—A failure on the part of the trial court to determine the second branch of a motion to strike out one defense, and make another more definite and certain, is material error, for which a reversal of the judgment may be had on appeal.

ACTION to recover the purchase price of goods sold. Amongst the allegations of the answer, it was alleged that plaintiff was a member of an unlawful trust or combination dealing in the goods sold, and formed to acquire a complete control and monopoly in the sale thereof; that it was impossible for defendant to purchase such goods, except through members of such trust, and that by reason thereof defendant was compelled to pay a price greatly in excess of the market value of such goods, and, for the purpose of recovering overcharges on purchases, was obliged to agree to purchase all such goods for six months from said trust or members thereof, and by so doing receive a rebate on the purchase

price. Plaintiff appealed from an order denying a motion to strike out certain parts of the answer as irrelevant, and to make other parts thereof more definite and certain.

G. E. Sutherland, for the appellant.

C. W. Briggs, for the respondent.

355 PINNEY, J. 1. Taking the allegations of the first defense in their most liberal sense, it is apparent that they are irrelevant, and have no legal relation to the controversy between the parties to the action, which is, whether the plaintiff shall recover the demand set forth in its complaint. It is obvious that they state no defense to the action; and it does not appear that any of the matters so set up can be material in any aspect of the case as now presented, but they are of such a character that they may embarrass and prejudice the plaintiff in preparing for trial and in maintaining its action upon the merits. An entire defense may be stricken out as irrelevant (Rev. Stats., sec. 2684); and where a defense is irrelevant and of the tendency above indicated, it ought to be stricken out on motion: *Horton v. Arnold*, 17 Wis. 139; *Joint School Dist. v. Kemen*, 65 Wis. 282. But in this instance the motion was denied, with ten dollars costs of motion against the plaintiff.

The first defense does not deny any allegation of the complaint, but the substance of it is, that the sale and delivery of the goods in question to the defendant was void as against public policy, because the vendor was at the time a member of an unlawful trust or combination formed to unlawfully interfere with the freedom of trade and commerce, and in restraint thereof, and to accomplish the ends therein set forth. It is not claimed in the answer that the trust or combination had acquired the control and monopoly of all such goods, or that the defendant might not have purchased the goods in question of other dealers in Milwaukee or elsewhere. Conceding, for the purposes of this case, that the trust or combination in question may be illegal, and its members may be restrained from carrying out the purposes for which it was created by a court of equity in a suit on behalf of the public, or may be subject to indictment and punishment, there is, nevertheless, no allegation showing, or tending to show, that the contract of **356** sale between the plaintiff and defendant was tainted with any illegality, or was contrary to public policy. The argument, if any, the case admits of, is

that, as the plaintiff was a member of the so-called "trust" or "combination," the defendant might voluntarily purchase the goods in question of it at an agreed price, and convert them to its own use, and be justified in a court of justice in its refusal to pay the plaintiff for them, because of the connection of the vendor with such trust or combination. The plaintiff's cause of action is in no legal sense dependent upon, or affected by, the alleged illegality of the trust or combination, because the illegality, if any, is entirely collateral to the transaction in question, and the court is not called upon in this action to enforce any contract tainted with illegality or contrary to public policy. The mere fact that the plaintiff is a member of a trust or combination created with the intent and purposes set forth in the answer will not disable or prevent it in law from selling goods within, or affected by, the provisions of such trust or combination, and recovering their price or value. It does not appear that it had stipulated to refrain from such transactions. A contrary doctrine would lead to most startling and dangerous consequences. The defendant is not a party to any illegal contract, and the case is, therefore, not within the rule of *Wheeler v. Russell*, 17 Mass. 281, and many similar cases, to the effect that "no action will lie upon a contract made in violation of a statute or a principle of the common law"; for the right of the plaintiff to make the sale in question, or of the defendant to buy, was in no way connected with, or dependent upon, the alleged trust or combination, although the plaintiff was a member of it. These views are sustained and illustrated by the cases of *Brooks v. Martin*, 2 Wall. 70, and *Sharp v. Taylor*, 2 Phill. Ch. 801; and many other cases might be cited to the same effect. The provision for a rebate of a part of the purchase price to purchasers ³⁵⁷ who would conduct their business in the manner stated in the answer was an inducement to them to continue their business relations with the plaintiff. It does not appear that there was any contract obliging the defendant to that course. A party may legally purchase the trade and business of another for the purpose of preventing competition, and the restraint of trade caused thereby is not, we think, unreasonable: *Mitchell v. Reynolds*, 1 Smith's Lead. Cas., 8th ed., pt. 2, p. 756 (*417), and notes. And it would seem that an agreement between a number of dealers and manufacturers to raise prices, unless they practically control the entire commodity—and this is not claimed of the trust

in question—cannot operate as a restraint upon trade, nor would it injuriously affect the public.

Both the plaintiff and defendant are Wisconsin corporations, and the goods in question were sold in this state. The sale, therefore, was not a transaction of interstate commerce, and was not within the act of Congress of July 2, 1890: 26 Stats. at Large, 209.

The allegation that the trust or combination is the real party in interest in this action, and that it can only be maintained by it, and should be dismissed, unless brought in its name, or the names of all the members thereof, is fatally defective as a plea or defense in abatement. It does not appear whether the alleged trust or combination is a partnership or a corporation, and so a legal entity, capable of suing or being sued; nor is it averred that it, or any of its members other than the plaintiff, had any interest in the goods sold, or the money to be paid for them. The answer in this respect deals only in conclusions of law, leaving wholly uncontroverted the allegations of the complaint that the goods in question were sold and delivered by the plaintiff to the defendant at a price agreed upon between them; nor does it deny the allegation of indebtedness ³⁵⁸ therefor to the plaintiff. It fails to state any facts showing that the action is not rightly brought in the name of the plaintiff.

2. The circuit court omitted, inadvertently as we presume, to pass upon the second branch of the plaintiff's motion, namely, to make certain portions of the second defense more definite and certain. It is correct practice, we think, to combine in a single motion as many objections as the plaintiff supposes the defendant's answer is subject to, with a view of having them all determined at the same time, and not piecemeal, thus avoiding a multiplicity of motions and possible appeals. The plaintiff had an undoubted right to have its motion decided in all its material aspects, and, without indicating any opinion whether the motion as to the second defense should have been to make it more definite and certain, or for a bill of particulars thereof, we hold that it was material error for the circuit court to omit or fail to determine this branch of the motion; for, until determined, the plaintiff could not secure the rights which the statute gives it in respect to such pleading, to either have the same made more definite and certain, or a bill of particulars under it,

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and it is thereby deprived of all remedy it may have in this
respect.

For these reasons the order of the circuit court is erroneous, and must be reversed, and the cause remanded to the circuit court for further proceedings according to law.

By the COURT. It is so ordered.

INTERSTATE COMMERCE—INTERCOURSE BETWEEN DIFFERENT STATES.—To constitute interstate commerce, there must be traffic and interstate intercourse between different states: *State v. Harrub*, 95 Ala. 176; 36 Am. St. Rep. 195. See the extended note to *People v. Wemple*, 27 Am. St. Rep. 547.

CONTRACTS FOR REBATES—VALIDITY.—A contract between a carrier and a shipper, by which the carrier agrees to receive at the time of shipment a designated sum as compensation for the transportation of grain, and to refund a certain sum when the transportation is completed, is valid and binding: *Cleveland etc. Ry. Co. v. Closser*, 126 Ind. 348; 22 Am. St. Rep. 593, and note.

WILLIAMSON v. MICHIGAN FIRE AND MARINE INSURANCE COMPANY.

[86 WISCONSIN, 393.]

INSURANCE—LOSS PAYABLE TO MORTGAGEE—ASSIGNMENT—PARTIES.—A provision in an insurance policy that the loss shall be payable to a mortgagee or his assign, as his interest may appear, operates only as a conditional appointment to pay so much of the proceeds of the policy as may be equal to the amount of the mortgage at the time of a loss under the policy. Such provision does not amount to an assignment of the policy, so that in case of loss the mortgagee alone may sue and recover for it. The right of action is still in the mortgagor.

INSURANCE—LOSS PAYABLE TO MORTGAGEE—PARTIES.—A provision in a policy of insurance that the loss shall be payable to a mortgagee or his assign, as his interest may appear, does not operate as an assignment of the policy, whether the mortgage debt is greater or less than the insurance, and an action for a loss under the policy must be brought in the name of the insured, although the mortgagee or his assign, in respect to his interest, may be joined with the mortgagor as coplaintiff.

Eaton and Weed, for the appellant.

Thompsons, Harshaw and Davidson, for the respondent.

395 PINNEY, J. The plaintiff could not maintain an action upon the policy in question as sole plaintiff. The legal right of action was in the insured, and the provision in the policy, "loss, if any, first payable to Jennie Perkins or assigns, as her mortgage interest may appear," operated only as a conditional

appointment or order to pay so much of the proceeds of the policy as might be equal to the amount due on the mortgage at the time of, and in the event of, a loss under it. It was not operative *in præsenti*, and the insured was still the owner of the policy. If the mortgage was paid before any loss occurred it could not become effective. These considerations serve to show that, whether the mortgage debt be greater or less than the amount of ³⁹⁶ the policy when written, such a provision in favor of a mortgagee does not operate as an assignment of the policy. It is still the owner of the premises who is insured, and the contract of the company is with him alone, and the continued validity of the policy is dependent upon the performance by him of the conditions embraced in it. It is not the interest of the mortgagee in the premises that is insured; and it seems clear, therefore, that an action for the recovery of the money in case of loss must be brought in the name of the insured, but that the mortgagee, in respect to his interest, may be joined with him as a coplaintiff. The recent cases of *Hodgson v. German Ins. Co.*, 86 Wis. 323, and *Chandos v. American F. Ins. Co.*, 84 Wis. 184, are decisive of the question involved. 2 Wood on Insurance, 1122, *Martin v. Franklin F. Ins. Co.*, 38 N. J. L. 140, *Hartford F. Ins. Co. v. Davenport*, 37 Mich. 613, and *Warbasse v. Sussex County Mut. Ins. Co.*, 42 N. J. L. 203, may be referred to in addition to the authorities cited in these cases.

It is not the interest of the mortgagee that is insured, but the interest of the mortgagor; and it seems illogical to say that whether such an appointment will operate as an assignment of the policy, if it can so operate at all, is dependent upon whether the sum due on the mortgage is greater or less than the amount of the loss. The company says, in substance, to the insured: "In consideration of the stipulated premium, we insure you against loss by fire on the property described, in the sum of four hundred dollars; and at your request, in case a loss occurs, we will pay it to J. P., to the extent that any sum may then remain due on his mortgage." This is clearly not an assignment of the policy so that in case of loss the mortgagee alone may sue and recover for it. It is no more than a conditional appointment or agreement for the future appropriation of all or a part of the moneys that may become due under the policy, according to future events, depending for its operation ³⁹⁷ upon an actual loss and some thing remaining due on the mortgage. The case is not

one of a defect of parties, but of a want of sufficient interest in the plaintiff to enable him to recover. The judgment of the county court is erroneous and must be reversed.

By the COURT. The judgment of the county court of Winnebago county is reversed, and the cause remanded for a new trial, and with directions that the insured be properly made a party to the action.

INSURANCE—ASSIGNMENT OF POLICY.—An insurance policy making the loss payable to another than the assured must be regarded as having been at its inception assigned to such other person with the consent of the company: *National etc. Ins. Co. v. Crane*, 16 Md. 260; 77 Am. Dec. 289. For an extended discussion of the assignment of policies of insurance, see the note to *New York etc. Ins. Co. v. Flack*, 56 Am. Dec. 750.

EVANS v. CHICAGO, ST. PAUL, MINNEAPOLIS, AND OMAHA RAILWAY COMPANY.

[86 WISCONSIN, 597.]

RAILROADS—NUISANCE—OBSTRUCTION OF STREET—RIGHT OF PRIVATE OWNER TO RECOVER.—The use of a street by a railroad company in such manner as to completely obstruct travel with teams thereon, and to entirely destroy its use as a public highway, constitutes a public nuisance if without permission or authority. To entitle a private owner to recover for such nuisance, it must appear that he has suffered some special or peculiar damage, differing, not merely in degree, but in kind, from that which is deemed common to all, but a complaint by such owner alleging such special and peculiar damage in the loss of business, access to, or egress from, his property, and value thereof, states a good cause of action.

RAILROADS—OBSTRUCTION OF STREET.—An instrument granting a railroad company the right to construct, maintain, and operate its road in the street in front of the grantor's lot, "as the same was at the date of said instrument constructed," does not give the company any right thereafter to destroy such street as a public highway in front of such lot.

RAILROADS—OBSTRUCTION OF STREET.—A railroad company cannot monopolize a street in derogation of the public or private use to which it has been applied. Such use of the street is a nuisance, and may be abated as such.

ACTION to recover damages for the unlawful obstruction of a public street by a railroad company. Defendant appeals from an order overruling a general demurrer to plaintiff's complaint.

Solon L. Perrin, for the appellant.

R. S. Reid and Baker and Helms, for the respondent.

⁶⁰² CASSODAY, J. It sufficiently appears that since the construction of the depot mentioned the defendant had used the street opposite the plaintiff's lot in such a manner as to completely obstruct all travel with teams thereon, and to entirely destroy the ⁶⁰³ use of the same as a public highway, and thereby prevented the plaintiff's former customers, and other persons who would otherwise have done business with him at his warehouse and elevator, from having access to, or egress from, the same, and that by such action the defendant has destroyed the plaintiff's business and rendered his premises of but very little value. If such obstruction was wrongful, unlawful, and without permission or authority from the plaintiff or his grantor, or the city of Hudson, as alleged, then it certainly constituted a public nuisance, and subject to be abated as such: *Elliott on Roads and Streets*, 477 et seq. But to entitle a private party to maintain an action for such public nuisance at common law, it must appear that he has suffered some special or peculiar damage, differing, not merely in degree, but in kind, from that which is deemed common to all: *Carpenter v. Mann*, 17 Wis. 155; *Zettel v. West Bend*, 79 Wis. 316; 24 Am. St. Rep. 715; *Hay v. Weber*, 79 Wis. 591. But here the complaint alleges such special and peculiar damage, and hence states a good cause of action at common law: *Walker v. Shepardson*, 2 Wis. 384; 60 Am. Dec. 423; *Enos v. Hamilton*, 27 Wis. 256; *Pettibone v. Hamilton*, 40 Wis. 402; *Burrows v. Pixley*, 1 Root, 362; 1 Am. Dec. 56; *Stetson v. Faxon*, 19 Pick. 147; 31 Am. Dec. 123; *Iveson v. Moore*, 1 Ld. Raym. 486; *Wilkes v. Hungerford Market Co.*, 2 Bing. N. C. 281; *Goldthorpe v. Hardman*, 13 Mees. & W. 377; 16 Am. & Eng. Ency. of Law, 971 et seq. Such right of action at common law has not been taken away by the English statutes: *Beckett v. Midland Ry. Co.*, L. R. 3 C. P. 82; *McCarthy v. Metropolitan Board*, L. R. 8 C. P. 191, affirmed L. R. 7 H. L. 243; *Fritz v. Hobson*, L. R. 14 Ch. Div. 542; *Truman v. London etc. Ry. Co.*, L. R. 29 Ch. Div. 89; *Caledonian Ry. Co. v. Walker's Trustees*, L. R. 7 App. Cas. 259; *Rapier v. London T. Co.*, (1893) 2 Ch. 588. Some of these cases are quite analogous to the case at bar. Thus, in *Fritz v. Hobson*, L. R. 14 Ch. Div. 542, it was expressly held that, "when the private ⁶⁰⁴ right of the owner of a house adjoining a highway to access from his house to the highway is interfered with by an unreasonable use of the highway, he is entitled to recover damages from the wrongdoer, in respect

of loss of custom in the business which he carries on in his house." Our statute is confirmatory of the common law, and declares, in effect, that the circuit courts shall have jurisdiction of actions to recover damages for and to abate a public nuisance from which any person suffers a private or special injury peculiar to himself, so far as necessary to protect the rights of such person, and to grant injunctions to prevent the same: Rev. Stats., sec. 3180.

According to the complaint, the defendant has had no authority, as against the plaintiff, to obstruct the street in front of his premises, except under and by virtue of the instrument in writing, whereby there was granted to the defendant's predecessor "the right to construct, maintain, and operate its railroad" in the street, "in front of said lot, . . . as the same was at the date of said instrument constructed." Of course, this grant gave to the defendant's predecessor, and so to the defendant, all the rights which are thereby necessarily implied. But manifestly it gave to neither the right to destroy the street as a public highway in front of the plaintiff's lot. The statutes only authorized such construction and maintenance of such railroad in the street on condition that the company should restore the highway "to its former state, or to such condition as that its usefulness" should "not be materially impaired, and thereafter maintain the same in such condition against any effects in any manner produced by such railroad": Rev. Stats., sec. 1828, subd. 5, sec. 1836. It has repeatedly been held that such duty is enforceable by the courts: *Jamestown v. Chicago etc. R. R. Co.*, 69 Wis. 648; *Oshkosh v. Milwaukee R. R. Co.*, 74 Wis. 534; 17 Am. St. Rep. 175; *State v. Chicago etc. R. R. Co.*, 79 Wis. 259. Thus, it appears that the obstruction and interference ⁶⁰⁵ with the street complained of were not authorized by statute. The case, therefore, is clearly distinguishable from that class of cases where the incidental injury complained of is the necessary result of an authorized taking of land, and the proper and authorized use of the same.

"A railroad company cannot monopolize a street in derogation of the public and private use to which it has been applied": *Janesville v. Milwaukee etc. R. R. Co.*, 7 Wis. 484. In *Farrand v. Chicago etc. Ry. Co.*, 21 Wis. 438, Dixon, C. J., said: "The company has no right to appropriate the whole or any part of the street to its own exclusive use, as for side tracks, switches, engine-houses, depot buildings, and the like,

and so destroy the public right of way." In *Pennsylvania R. R. Co. v. Angel*, 41 N. J. Eq. 316, 56 Am. Rep. 1, it was held that "a railroad company using, for the purposes of a terminal yard, a portion of a street over which it has only a right of way, is responsible for any nuisance, public or private, thereby created." The same rule was applied in the same state, where, as here, the railway company acquired the right to lay its track in a public street by grant: *Pennsylvania R. R. Co. v. Thompson*, 45 N. J. Eq. 870. In *Baltimore etc. R. R. Co. v. Fifth Baptist Church*, 108 U. S. 329, Mr. Justice Field, speaking for the court, said: "The engine-house and repair shop of the railroad company, as they were used, rendered it impossible for the plaintiff to occupy its building with any comfort as a place of public worship. . . . Plainly, the engine-house and repair shop, as they were used by the railroad company, were a nuisance in every sense of the term. . . . For such annoyance and discomfort the courts of law will afford redress by giving damages against the wrongdoer, and when the cause of the annoyance and discomfort are continuous courts of equity will interfere and restrain the nuisance": *Baltimore etc. R. R. Co. v. Fifth Baptist Church*, 137 U. S. 568. See, also, *New York El. R. R. Co. v. Fifth Nat. Bank*, 135 U. S. 432. In *Truman v. London etc. R. R. Co.*, L. R. 29 Ch. Div. 89, the ⁶⁰⁶ railway company, under the authority of an act of Parliament, purchased a piece of land adjoining one of its stations, and used it as a cattle dock; and yet it was held that the act gave the company no authority to create a nuisance to occupiers of houses near the cattle dock by herding cattle therein. So, in *Rapier v. London T. Co.*, (1893) 2 Ch. 588, it was "held that, although horses were necessary for the working of the tramways, the company were not justified by their statutory powers in using the stables so as to be a nuisance to their neighbors, and that it was no sufficient defense to say that they had taken all reasonable care to prevent it."

The obstruction of the passage to and egress from the warehouse and elevator in question by means of a permanent embankment, the storing of cars, and other mere depot uses, is not only in contravention of the express terms of the grant, but also of the mandate of the statute cited. Upon authority and reason, we must hold that the complaint states a good cause of action.

By the COURT. The order of the circuit court is affirmed.

RAILROADS—OBSTRUCTION OF HIGHWAYS.—The right of a railroad company to interfere with a highway is coupled with the duty to make it as safe as it was before it was disturbed. Any one unlawfully interfering with a highway creates a nuisance, and is liable in damages to one who suffers special injury: *Evansville etc. R. R. Co. v. Crist*, 116 Ind. 446; 9 Am. St. Rep. 865, and note; *Palatka etc. R. R. Co. v. State*, 23 Fla. 546; 11 Am. St. Rep. 395, and note.

RAILROADS IN HIGHWAYS—RIGHT TO EXCLUSIVE USE.—A franchise granted to a street railway gives it no exclusive use of that portion of the street upon which its road is constructed, but only the right to construct such road in such place and manner as not to interfere with the use of the street by the public: *Pacific Ry. Co. v. Wade*, 91 Cal. 449; 25 Am. St. Rep. 201, and note; *Rascher v. East Detroit etc. Ry. Co.*, 90 Mich. 413; 30 Am. St. Rep. 447; *Gilmore v. Federal Street etc. Ry. Co.*, 153 Pa. St. 31; 34 Am. St. Rep. 682, and note. See the extended note to *Western Paving etc. Co. v. Citizens' etc. R. R. Co.*, 25 Am. St. Rep. 475.

STATE v. OATES.

[86 WISCONSIN, 684.]

OFFICE AND OFFICERS—RIGHTS OF HOLDER OF CERTIFICATE OF ELECTION.

One duly declared elected to office by proper authority, and who, after receiving a certificate of election, has duly qualified, is *prima facie* entitled to the office when his term begins, as against every one except a *de facto* officer in possession under color of authority.

OFFICE AND OFFICERS.—DE FACTO OFFICERS are those who are in possession of office and discharging their duty under color of authority. By color of authority is meant authority derived from an election or appointment, however irregular or informal, so that the incumbent is not a mere volunteer.

OFFICE AND OFFICERS.—DE FACTO OFFICERS.—One who retains an office after the expiration of his term, claiming that he is re-elected, but without color of authority, is not a *de facto* officer, as against one who holds the certificate of election to the office, and has qualified as required by law.

OFFICE AND OFFICERS.—MANDAMUS TO OBTAIN POSSESSION.—One *prima facie* entitled to an office under the authorized canvass of votes and certificate of election may enforce his right to the possession of the office by writ of *mandamus*, as against one who holds the office without color of authority after the expiration of his term, especially when the statutory proceeding to compel the delivery of the books and papers of the office is inadequate.

OFFICE AND OFFICERS.—MANDAMUS TO OBTAIN POSSESSION—DEFENSE.—A person entitled to immediate possession of an office under his *prima facie* title thereto may enforce his right by *mandamus*, unaffected by the fact that another claiming a right to the office may be able, in *quo warranto* proceedings, to successfully contest such *prima facie* title.

OFFICE AND OFFICERS.—MANDAMUS TO OBTAIN POSSESSION—DEFENSE.—In a *mandamus* proceeding by a person holding *prima facie* title to an office, to enforce his right to immediate possession thereto, the fact that another claimant received a greater number of legal votes at the election is not pleadable as a defense.

OFFICE AND OFFICERS—MANDAMUS TO CONTEST ELECTION.—**QUO WARRANTO** is the proper proceeding by which to contest an election. It cannot be contested by *mandamus*.

MANDAMUS—IMMATERIAL DEFECT.—Although an alternative writ of *mandamus* is defective in that it is signed by the judge instead of the clerk of the court, and is not under seal, the defect must be regarded as immaterial when no substantial right is affected.

Orton and Osborn, and Wilson and Martin, for the appellant.

Murphy and Gardner, and J. L. O'Connor, for the respondent.

636 WINSLOW, J. It clearly appears by the statements of the relation and the expressed or implied admissions in the return that the relator was declared elected to the office of clerk of the circuit court of La Fayette county by the county board of canvassers of that county; that he received the proper certificate of election to that office; and that he qualified therefor as required by law; also that the defendant was the former incumbent of the office, and has retained possession of the same after the expiration of his term without certificate, commission, or other semblance of authority or right, but he claims that he can show that he in fact received the greater number of votes for the office.

The question first presented is, what effect is to be given to the canvass and certificate of election? Is the canvass a mere exercise in addition, to ascertain which column of figures is the greater? Is the certificate only a trophy given to the victor in the electoral battle, which is good for nothing except to exhibit to admiring friends, or hang upon the wall as an evidence of political prowess? If these questions are to be answered in the affirmative, then the canvass and the issuance of the certificate are evidently as 637 useless as they are harmless. We think, however, that there is a substantial right conferred by the canvass on the person declared to be elected, of which right the certificate is the legal evidence. The canvass is for a purpose. It is to determine who was elected to the office. It is conducted by a tribunal created by the law to ascertain and decide that very question, and its determination must have some effect. Now, the effect which it has, plainly, must be to determine who is elected to the office. Not necessarily to determine the fact permanently, or beyond the possibility of revision or reversal, but to determine the fact for the time being, and until a different result be reached in a proper proceeding to contest the title of the cer-

tificate holder to the office. As against any intruder in the office, and in fact as against all the world except a *de facto* officer in possession of the office under color of authority, the fact is settled by the determination of the canvassers until, in a proper proceeding, that determination is reversed. This doctrine is in accordance with the uniform current of authority: McCrary on Elections, secs. 204-221, and cases cited; Merrill on Mandamus, sec. 142.

A moment's reflection will convince any mind that this is not only a reasonable doctrine, but the only doctrine which can be tolerated. There will arise many disputed elections. It may sometimes consume much time to determine finally and conclusively who was elected. In the mean time the public welfare imperatively demands that the office be occupied by some one empowered to discharge its duties. Who shall it be? Shall it be the man who bears the certificate and has in his favor the adjudication of the tribunal created by law to primarily decide that question, or shall it be by an intruder, with no color of authority, with neither certificate or commission of any kind, who, by accident, being in possession of the office, says that he was in fact elected thereto? There can be but one reasonable answer to this question. Plainly, the man with the certificate, ⁶³⁸ and the canvass in his favor, must be admitted to the office, until a competent tribunal reverses the decision of the canvassers. Any other doctrine would be subversive of all law and order. The prior incumbent could as well turn over the possession of the office to another defeated candidate, on the pretense that he knew this other candidate was really elected, as to hold possession himself. Thus, the prior incumbent would become the judge of the *prima facie* title to the office, instead of the canvassing board. The opportunities thus afforded to defeated candidates to temporarily thwart the will of the people need only be suggested; they need not be dwelt upon.

It seems very clear to us that the power to decide the *prima facie* right to an office lies with the canvassing board.

This *prima facie* right, if it means any thing, must mean that the person having it has the right to the possession of the office and its books, papers, and other property when his term of office begins, if he has duly qualified. To this, we think, there is but one exception, and that is when the office is already filled by a *de facto* officer. There has been much discussion as to what will constitute a *de facto* officer. It is

not material here to consider who may be a *de facto* officer as to third persons and the public in general. The question is, who is a *de facto* officer, as against the person holding a certificate of election, who has duly qualified as required by law? On this question the law is well settled. A *de facto* officer is one who is in possession of an office, and discharging its duties under color of authority: McCrary on Elections, 3d ed., sec. 218; 2 Dillon on Municipal Corporations, sec. 892. By color of authority is meant authority derived from an election or appointment, however irregular or informal, so that the incumbent be not a mere volunteer: McCrary on Elections, sec. 218. Tested by this rule, it is apparent that the defendant is in no proper sense a *de facto* officer as against the relator. There has been no canvass or determination ⁴³⁹ by any one in his favor, nor has he any certificate, commission, or authority from any person, officer, or board purporting to authorize him to discharge the duties of the office.

The defendant not being a *de facto* officer, it was his duty to surrender to the relator the property of the office at the commencement of the relator's term. Such a surrender would have been simply a recognition of the relator's *prima facie* title to the office under the canvass and certificate. It would not have affected any right the defendant might have to contest the election of relator in a proper proceeding. If it was the right of relator to be admitted to the office under his *prima facie* title, and hold it pending a contest, it is evident that the right may be enforced by *mandamus*. Blackstone says the writ issues in "all cases where a party hath a right to have a thing done, and hath no other specific means of compelling its performance": 3 Blackstone's Commentaries, 110. The authorities are numerous that *mandamus* is the appropriate remedy in such a case: Merrill on Mandamus, secs. 142, 143; *People v. Head*, 25 Ill. 325; *Crowell v. Lambert*, 10 Minn. 369; *State v. Sherwood*, 15 Minn. 221; 2 Am. Rep. 116; *State v. Churchill*, 15 Minn. 455; *State v. Jaynes*, 19 Neb. 161.

It is said that the relator has an adequate remedy, under the statute, by proceedings to compel the delivery of books and papers: Rev. Stats., secs. 977, 983. It is quite evident that these statutory provisions afford no adequate remedy to the relator. They provide only for the delivery of books and papers. In the present case the seal of office and the moneys appertaining thereto are also desired, and neither could be

obtained by a proceeding under the statute. We think the statutory proceeding inadequate.

Having held that the relator had a clear right to the possession of the office and its property under his *prima facie* title, and that *mandamus* is the appropriate remedy to enforce ⁶⁴⁰ that right, the case is practically disposed of. The relator's right to possession under his *prima facie* title is not affected by the fact that defendant may be able in *quo warranto* proceedings to successfully contest relator's *prima facie* title. Pending such contest, as we have seen, the relator's right to possession is perfect as against every one except a *de facto* officer holding under color of authority; and defendant is not such an officer. This makes it very plain that the defendant's allegations tending to show that he received the greater number of legal votes at the election were not pleadable as a defense to this *mandamus* proceeding; hence we express no opinion on the question whether the four votes which lacked the signature of one ballot clerk were in fact legal votes or not. It is a most interesting question, and by no means free from doubt, but it cannot properly be decided here.

Judgment for the relator in these *mandamus* proceedings does not determine the final rights of the parties; it simply determines that relator had a right to immediate possession under his *prima facie* title. It might perhaps determine the final right had both parties chosen to litigate it in this proceeding, but the relator has not chosen to litigate it, but has, by demurrer, challenged the sufficiency of the return. *Mandamus* is not the proper proceeding in which to contest an election: *State v. Sullivan*, 83 Wis. 416.

It appears that the alternative writ in this case was defective in that it was signed by the circuit judge instead of the clerk of court, and it did not bear the seal of the court. The objection was duly taken by motion, but overruled. The alternative writ is, however, little more, in legal effect, than an order to show cause: *People v. New York Common Pleas*, 13 Wend. 649-655, note; 28 Am. Dec. 495. Strictly, probably the objection should have been sustained, but we do not regard ⁶⁴¹ the error as affecting any substantial right, and shall not reverse the judgment on that account: Rev. Stats., sec. 2829.

The questions involved in this case were very fully discussed by the late Mr. Justice Taylor in the case of *Supervisors v.*

O'Malley, 46 Wis. 35, and the conclusions there stated are identical with the conclusions reached in this opinion, and stated, perhaps, with greater force and perspicuity. Inasmuch, however, as that case was not a contest between the parties claiming the office, and these questions were only collaterally involved, we have deemed it proper to review the question as an original one.

By the COURT. Judgment affirmed.

OFFICERS DE FACTO—WHO ARE.—A *de facto* officer is one who acts under color of a known and valid appointment, but has failed to conform to some precedent requirement: *Weatherford v. State*, 31 Tex. Cr. Rep. 530; 37 Am. St. Rep. 828, and note; *Walcott v. Wells*, 21 Nev. 47; 37 Am. St. Rep. 478, and note. See, also, the extended notes to *Smith v. Bondurant*, 58 Am. Rep. 440, and *Hildreth v. McIntire*, 19 Am. Dec. 63.

OFFICERS HOLDING OVER—WHETHER DE FACTO.—City councilmen holding over after their term has expired, and after their successors have been elected and have qualified, but before the latter have taken their seats, are *de facto* officers: *Magneau v. City of Fremont*, 30 Neb. 843; 27 Am. St. Rep. 436.

MANDAMUS TO OBTAIN POSSESSION OF AN OFFICE.—*Mandamus* is never issued when a person is in an office by color of right to admit another; the proper remedy is an information in the nature of a *quo warranto*: *St. Louis County Court v. Sparks*, 10 Mo. 117; 45 Am. Dec. 355, and note; *People v. Olds*, 3 Cal. 167; 58 Am. Dec. 398; *State v. Dunn*, Minor, 46; 12 Am. Dec. 25, and extended note. *Mandamus* is not the proper proceeding by which to oust from office an acting officer not a party thereto: *Pariseau v. Board of Education*, 96 Mich. 302. An information in the nature of a *quo warranto* lies against a person who unlawfully holds an office to which he was at first entitled: *Burgess v. Davis*, 138 Ill. 578. *Quo warranto* lies to oust an illegal incumbent from an office, not to induct the legal officer into it: *State v. Lane*, 16 R. I. 620. But see *State v. Sherwood*, 15 Minn. 221; 2 Am. Rep. 116, in which it was held that where the relator had received a certificate of election from the proper officer, and had taken the oath, and had demanded the office from the former officer who was in possession and refused to give it up on the ground that relator was ineligible, that the relator was entitled to *mandamus*.

QUO WARRANTO—TRYING TITLE TO OFFICE.—When the title to an office is the subject of controversy, then *quo warranto* is the exclusive legal remedy: *State v. Millville*, 53 N. J. L. 362; *Frey v. Michie*, 68 Mich. 323; *State v. Sullivan*, 83 Wis. 416; *People v. Pease*, 27 N. Y. 45; 84 Am. Dec. 242; *People v. Olds*, 3 Cal. 167; 58 Am. Dec. 398; *Hamlin v. Kassafer*, 15 Or. 456; 3 Am. St. Rep. 176, and note. The same rule is indirectly maintained in *Walcott v. Wells*, 21 Nev. 47; 37 Am. St. Rep. 478.

IN RE RADL

[86 WISCONSIN, 645.]

OFFICER DE FACTO.—If an office exists *de jure*, a person appointed to fill a vacancy therein, who qualifies, is a *de facto* officer, although the assumed appointing power has no power to appoint.

OFFICERS.—WRIT OF PROHIBITION DOES NOT LIE to test the title of a *de facto* judicial officer.

Rublee A. Cole, for the petitioner.

W. S. Stroud, for the respondent.

645 **PER CURIAM.** It appears that F. M. Shaughnessey was appointed a justice of the peace by the common council of Portage, to fill a vacancy made by the resignation of another. Thereupon, an action was commenced before such justice, and a summons issued by him in favor of one Charles Chislow and against the petitioner herein, Charles Radl. Upon the return of the summons served upon Radl, he applied to this court for a writ of prohibition to perpetually restrain such justice from taking any steps or exercising any jurisdiction in the cause, on the ground that the common council had no lawful authority to fill such vacancy by appointment.

Assuming such to be the facts, still, as there was such an office *de jure* in the city as justice of the peace to be filled, and as the person who here acted was ostensibly appointed to fill that office, and qualified, we must regard him as being such officer, at least *de facto*, and hence must hold that he had jurisdiction in the case, and that his official acts were binding upon the parties: *In re Boyle*, 9 Wis. **646** 264; *State v. Bloom*, 17 Wis. 521; *Chicago etc. Ry. Co. v. Langlade Co.*, 56 Wis. 627, 629; *Baker v. State*, 69 Wis. 37; *In re Burke*, 76 Wis. 357; *In re Manning*, 76 Wis. 365, affirmed in 139 U. S. 504. This court has held that under our statutes such writ issues only to restrain the acts of a court or other inferior tribunal exercising some judicial power which it has no legal authority to exercise: Rev. Stats., secs. 3457–3462; *State v. Gary*, 33 Wis. 93. It would seem that the writ is not to be applied to any officer or body on whom the law confers no power of pronouncing any judgment: *In re Godson*, 16 Ont. App. 452. “A writ of prohibition will not issue when there is any other adequate remedy”: *State v. Burton*, 11 Wis. 51; *State v. Commissioners of Roads*, 1 Mill Const. 55; 12 Am. Dec. 596; *Smith v. Whitney*, 116 U. S. 167; *Queen v. Local Gov-*

ernment Board, 10 Q. B. Div. 309. Here the petitioner appears to have another adequate remedy.

The precise question here presented has been recently determined by the supreme court of Minnesota. It was there properly held that "a writ of prohibition will not lie to test the title of a *de facto* judicial officer": *State v. McMartin*, 42 Minn. 30.

The writ is denied.

PROHIBITION.—TITLE TO AN OFFICE IS NOT TRIABLE IN PROCEEDINGS TO OBTAIN a writ of prohibition: *Walcott v. Wells*, 21 Nev. 47; 37 Am. St. Rep. 478.

OFFICERS DE FACTO—WHETHER EXIST WHERE APPOINTING POWER DEFECTIVE.—An officer *de facto* exists where one holds office by virtue of an election or appointment, where there was a want of power in the electing or appointing power: *Walcott v. Wells*, 21 Nev. 47; 37 Am. St. Rep. 478; *Mallett v. Uncle Sam etc. Mining Co.*, 1 Nev. 188; 90 Am. Dec. 484; *State v. Carroll*, 38 Conn. 449; 9 Am. Rep. 409. See the extended note to *Hildreth v. McIntire*, 19 Am. Dec. 65, 66.

COTTRELL v. SHEPHERD.

[86 WISCONSIN, 649.]

STATUTE OF LIMITATIONS—NEW PROMISE.—A grantee of a mortgagor who assumes and agrees to pay the mortgage does not, by subsequent payment of part of the principal and interest, toll the statute of limitations as against his grantor, the original mortgagor.

G. T. Thorn, for the appellant.

Goldberg and Hoxie, for the respondent.

650 ORTON, C. J. This is an action to foreclose a mortgage executed by the defendant, Henry Shepherd, and Margaret, his wife, to the plaintiff, on certain premises, on the nineteenth day of October, 1877, to secure a note given by and to the same persons, of two hundred and fifty dollars, at the same time, with ten per cent interest, payable the first day of June, 1883. The action was commenced August 9, 1890. On the twenty-ninth day of June, 1878, the said defendants sold and deeded the mortgaged premises to one Louis Roussau in consideration of three hundred and ten dollars, and said deed contained a covenant against encumbrances, except the said mortgage, and it was agreed verbally that Roussau was to pay said mortgage as a part of said consideration, and Roussau paid to the defendants sixty dollars, and on the mortgage

fifty dollars, at the time of the sale, and has paid since the interest on the note to July 7, 1888, and fifty dollars more on the principal in 1881. The balance due on the note and mortgage at the time of the judgment, of principal and interest, was two hundred and thirty-seven dollars, for which judgment was rendered, as also for forty dollars solicitor's fees. The said Roussau was made defendant, but made no answer, and his equity of redemption, as well as that of Shepherd and wife, was foreclosed. The plaintiff asked judgment for any deficiency after the sale against the said Henry Shepherd, but did not ask for any such personal judgment against said Roussau. The defendant, Shepherd, answered, setting up the statute of limitations on the note as a bar to any such personal judgment against him for any such deficiency, and this having appeared, no judgment for the same was rendered or ordered against him.

These are the material facts. The error assigned is that ⁶⁵¹ the court held that the statute was a bar to any personal judgment against Shepherd, and refused to embrace in the judgment of foreclosure any such order. The learned counsel of the appellant contends that the payments of interest and part of the principal of the note within the period of limitation by Roussau, the grantee, should be held to have been made by the said Shepherd, and that they removed the bar of the statute as to him, because Roussau occupied the relation of a joint debtor with, or agent of, Shepherd. This is the only question in the case.

The authorities cited by the learned counsel are not in point with this case, but are claimed to be the same in principle, as showing by analogy that Roussau, as such grantee, subject to the mortgage, and promising to pay the same, was a joint debtor or agent of Shepherd, or that his relation to him was in principle the same. There was no personal judgment asked against Roussau, and he did not answer; but the fact that he was such grantee of the Shepherds, and promised to pay the mortgage, and had made such payments on the mortgage, came into the case as matters of evidence, in order to show that the statute had not run as to Shepherd by reason of said payments.

We do not think such payments by Roussau can have such effect. The following reasons appear to be sufficient for so holding: 1. Roussau was not a joint debtor, or jointly liable,

with Shepherd. It is true, he promised Shepherd to pay the note, and became liable to pay it; but the plaintiff, as mortgagee, was not a party to such promise, and has not yet accepted the benefit of it, and has not sought to hold him liable on it. It has never become a novation. The plaintiff is not bound to pursue his remedy against Roussau. 2. Roussau did not make the payments for the benefit of Shepherd, but for his own benefit, to protect his equity of redemption or interest in the premises. Shepherd had no interest in the premises any longer to protect. ⁶⁵² It was immaterial to him whether Roussau paid the note or not, as far as the mortgage was concerned, for Roussau had bought the premises subject to the mortgage, and had promised to pay it, and he must pay it or lose his land. Shepherd had no interest in it except to protect himself against any deficiency after the sale of the premises. Shepherd made the note, and is liable to pay it. He is the only party to whom the plaintiff looks for payment. He ignores Roussau as a party to the note, or as liable to pay it. Roussau made some payments on the mortgage, and the plaintiff received them, as he was bound to do, for Roussau stood then in the place of the mortgagor owning the equity of redemption. He made them, however, for himself alone, and for his own protection. He did not do it as the agent of Shepherd in any sense, but was acting for himself alone. He did not profess to be acting for any one except himself, and it is not shown that Shepherd knew at the time that he was making the payments, or that he notified him of it. It would appear to be very unreasonable, as well as unjust, to impute these payments to the defendant, Shepherd, to have the legal effect of a new promise on his part to pay the note within the period of limitation. Roussau was not liable on the note, and could not be sued upon it. He could only be held liable, if at all, by the foreclosure of the mortgage. Then, by what authority could he make an acknowledgment for the defendant, Shepherd, that the note was still a subsisting indebtedness against him? The plaintiff's relations to the note and to Shepherd as the maker of it were not changed in the least by Roussau's purchasing the land subject to the mortgage, nor was Shepherd's liability to the plaintiff on the note changed or affected by it. The plaintiff and defendant Shepherd occupied the same relations towards each other as they did before. I can conceive of no process of rea-

soning by which these payments by Roussau can be made to be, in law, payments ⁶⁵³ made by the defendant, Shepherd, and I have not been able to find any case in the reports as authority for it.

This question is new in this court, and I think it could not have often arisen anywhere. The case of *Trustees v. Smith*, 52 Conn. 434, seems to be closely in point. That was a mortgage on certain tracts of land to secure a note for two thousand eight hundred and fifty dollars, as the purchase money for the land. The mortgagor sold the premises subject to the mortgage, and the grantees promised to pay it as a part of the consideration. The grantees had made payments of interest on the note within the period of limitation. The maker of the note set up the statute as a bar. He had never made any payments on the note himself, unless such payments by the grantees could be imputed to him, and it was held that such payments did not remove the bar of the statute or operate as a new undertaking or promise. Chief Justice Park, who wrote the opinion, said: "The defendant was directly and personally liable on the note, and when he conveyed the land mortgaged to his grantees, on their assumption and promise to pay the note as a part consideration of the purchase, the transaction altered in no respect whatever the liability of the defendant on the note. Neither did it increase or diminish the remedies of the plaintiffs. They could pursue the defendant on the note, or the lands in the hands of the grantees, just as well as before. . . . Their liabilities are separate and distinct. Neither party could do any thing to increase the liability of the other. How could the grantees, by any act of theirs, acknowledge that the mortgage debt was a subsisting indebtedness, so as to subject the defendant to a new liability upon it, when they themselves were not liable on the note? We think the grantees could do nothing, by word or deed, to remove the bar of the statute of limitations, so far as the defendant is concerned." We think this decision is supported by the ⁶⁵⁴ clearest reasons, and any decision to the contrary would be without and against reason.

In *Harlock v. Ashberry*, L. R. 18 Ch. Div. 229, the tenant of the mortgagor in possession of the mortgaged premises was required by the mortgagee to attorn and pay the rent to him, and the tenant did pay five pounds sterling on the rent,

and it was received as so much payment on the mortgage. This payment was set up as having removed the bar of the statute as against the mortgagor. The case was tried before Mr. Justice Fry, and he held the payment had such effect, but on appeal (*Harlock v. Ashberry*, L. R. 19 Ch. Div. 539), the master of the rolls, Sir George Jessel, and the lords justices, Sir William Baliol Brett and Sir John Holker, held the other way, that it did not remove the bar of the statute as to the mortgagor. The reasons given were that the mortgagor could not prevent the payment, however much he might have disapproved of it at the time; and that it was a payment of rent, and as rent, and not as a payment on the mortgage for the benefit of the mortgagor, either as principal or interest.

Inasmuch as such payments, to remove the bar of the statute, must have the effect of an acknowledgment of the debt, or a new promise, they should be made by some person who had the right to acknowledge the debt or to make the new promise, either the mortgagor or his authorized agent. In application to this case, the grantee had the right to make payments for himself to save his land, but had no right to make such payments for and on behalf of the mortgagor, as an acknowledgment of his debt, or as a new promise on his part. Conversely: "A mortgagor who sells the land subject to the mortgage cannot, by his subsequent acknowledgment, or payments of interest, toll the statute as to his grantees": *Lord v. Morris*, 18 Cal. 482-490; *Zoll v. Carnahan*, 83 Mo. 35; *Schmucker v. Sibert*, 18 655 Kan. 104; 26 Am. Rep. 765; *Day v. Baldwin*, 34 Iowa, 380; *Newbould v. Smith*, L. R. 33 Ch. Div. 127; 13 Am. & Eng. Ency. of Law, 761. In such cases it seems clear that neither the mortgagor nor the grantee, by acknowledgment or payments, can remove the bar of the statute as to the other.

The ruling of the circuit court, refusing to order a personal judgment against the defendant, Shepherd, for any deficiency after sale of the mortgaged premises, was not erroneous, and the judgment without such order is correct.

By the COURT. The judgment of the circuit court is affirmed.

LIMITATIONS OF ACTIONS—NEW PROMISE, BY WHOM MAY BE MADE: See the extended note to *Shoemaker v. Benedict*, 62 Am. Dec. 101. An acknowledgment or new promise by the maker of a promissory note does

not affect the right of collateral parties: *Gardiner v. Nutting*, 5 Greenl. 140; 17 Am. Dec. 211; *Lowther v. Chappel*, 8 Ala. 353; 42 Am. Dec. 643. The promise of a husband to pay the debt of his wife incurred before coverture cannot remove the bar of the statute against her: *Powers v. Southgate*, 15 Vt. 471; 40 Am. Dec. 691. Where the maker of a note has placed personal property in the hands of the payee as security, the payee's application thereof, without notice to the debtor, will not constitute a payment warranting the inference of a new promise: *Brown v. Latham*, 58 N. H. 30; 42 Am. Rep. 568.

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ADOPTION.

1. THE ACT OF ADOPTION OF A CHILD is one by which a person takes a child of another into his own family and treats it as his own. *Cosfer v. Scroggins*, 52.
2. ADOPTION OF A MINOR CHILD IS IN THE NATURE OF A PROCEEDING IN REM operative to change the *status* of the child, and, *ipso facto*, to render it

what the order of the court declares it to be, the child and heir of the adopting parent, and therefore capable of inheriting from him, in all respects, as if it had been his child, born in lawful wedlock, his property, real and personal, both in the state where the adoption proceedings took place and in every other state in which the *status* or the rights flowing therefrom are not inconsistent with, nor opposed to, its laws and policy. *Van Matre v. Sankey*, 196.

3. AN ADOPTED CHILD IS ENTITLED TO THE SAME HOMESTEAD EXEMPTION as if it were the natural child of the adopting parent or parents. *Cofer v. Scroggins*, 52.
4. AN ADOPTING PARENT assumes the duties of a natural parent, and is entitled to the custody of the child adopted, and to its services and earnings, as against all persons, except one of its parents who has not consented to the adoption. *Cofer v. Scroggins*, 52.
5. EFFECT OF.—A statutory proceeding of adoption, not according to the course of the common law, when legally conducted, utterly terminates all relations between the minor and his legitimate parents. *Schiltz v. Roenitz*, 873.
6. AN ORDER ADOPTING A MINOR CHILD FIXES THE STATUS OF THE CHILD and the adopting parent toward each other, and must be held conclusive upon the parties and their privies until reversed or set aside in the jurisdiction in which it was rendered. *Van Matre v. Sankey*, 196.
7. AN ORDER ADOPTING A CHILD ENTERED IN ANOTHER STATE by a court having jurisdiction of the parties and of the subject matter, cannot be impeached in this state by showing irregularity in the procedure or error in the rendition of the order. *Van Matre v. Sankey*, 196.
8. RESIDENTS.—A statute authorizing the adoption of a minor child by a resident of a county or state includes a temporary resident. A petition for such adoption may, therefore, be presented to, and heard and determined by, a proper court of any county of which the petitioner is a temporary resident, though he may at the same time be a citizen of another state. *Van Matre v. Sankey*, 196.
9. CONSTITUTIONAL LAW.—A state may authorize its courts, in the exercise of the power and duty of *parens patriæ*, to conduct proceedings for the adoption of minor children, without notice by publication or otherwise to the child, its parents, relatives, or next of kin. *Van Matre v. Sankey*, 196.
10. ESTOPPEL.—NEITHER AN ADOPTING PARENT NOR HIS HEIRS OR REPRESENTATIVES after his death can question the validity of the order of adoption of a minor child procured at his instance and with his consent. *Van Matre v. Sankey*, 196.
11. RES JUDICATA—ADOPTION PROCEEDINGS.—A PROCEEDING FOR THE REVOCATION OF AN ORDER ADOPTING A MINOR CHILD is not of so summary a character that it will not be treated as *res judicata*, and therefore as conclusive upon the rights of all the parties thereto. *Van Matre v. Sankey*, 196.
12. NOTICE TO PARENT.—An order of adoption based on the abandonment of a minor child by his parent is not conclusive against the latter if issued without notice to him of the proceeding, and an opportunity given to defend against them. *Schiltz v. Roenitz*, 873.
13. CONSENT.—The adoption of a minor without the consent of the relatives of her deceased mother, and against the opposition of the child's guardian, is valid, if the court finds that the best interest of the

child will be promoted by such adoption, and the relatives of the deceased father consent, and the guardian is removed on the day of the entry of the order of adoption, and the adopting parent appointed in his stead. *Van Matre v. Sankey*, 196.

14. ADOPTION OF MINOR CHILD IN ANOTHER STATE may affect the descent of real property in this state. *Van Matre v. Sankey*, 196.
15. ADOPTION OF A CHILD LIVING WITHOUT THE STATE WITHOUT NOTICE TO, OR CONSENT OF, SUCH CHILD is valid, if the legal domicile of the child is within the state, and its guardian was notified of, and appeared and opposed, the order of adoption, if the statute does not require the child to be personally present in court, or that it shall be notified of the proceedings. *Van Matre v. Sankey*, 196.
16. THE FAILURE OF THE COURT TO APPOINT A GUARDIAN AD LITEM, or next friend, to represent a minor in proceedings for its adoption, cannot render the order of adoption void on a collateral attack. *Van Matre v. Sankey*, 196.
17. STATUTES AUTHORIZING THE ADOPTION OF THE CHILDREN OF OTHER PERSONS should be given a liberal intendment and operation. *Cofey v. Scroggins*, 52.

ADVERSE POSSESSION.

1. ADVERSE POSSESSION MAY BE SHOWN BY ANY ACTS suitable to the character of the land. Neither fences nor cultivation are essential to such possession when the acts of ownership are those to which the lands are adapted, and are continuous, exclusive, and hostile to the claims of others. *Normant v. Eureka Co.*, 45.
2. TO CONSTITUTE ADVERSE POSSESSION the true owner must know that the adverse holder claims in his own right, or the possession must be so open and notorious as to raise the presumption of notice. *Normant v. Eureka Co.*, 45.
3. THE PAYMENT OF TAXES may be taken into consideration with other facts and circumstances relied upon to show an adverse possession of real property. *Normant v. Eureka Co.*, 45.
4. BOUNDARIES.—Possession by one coterminous owner may have been taken purely by mistake, but may have been held afterwards adversely to any right of the adjoining proprietor or any other person, intentionally, avowedly, openly, and continuously. When at the time of a conveyance the holding or possession was by mistake, and without intention to claim independently of the correctness or error of the line held up to, the conveyance is not void, as the holding is not adverse. When the holding is with the intention to claim the land adversely, independent of the correctness or error of the boundary line, and the claim of title and the possession are of a character to render the possession adverse to the true line within the meaning of the statute of limitations, a conveyance by the disseisor is void as against the disseisor as to such of the land as was so occupied at the time of the conveyance. *Watrous v. Morrison*, 139.
5. In cases of mistake as to the true boundary line between adjoining lands, the real test, as to whether or not a title is acquired by a holding for the period of the statute of limitations, is the intention of the party holding beyond the true line. If such occupation is by mere mistake, with no intention on the part of the occupant to claim, as his own, land which does not belong to him, but he intends to hold

only to the true line, wherever it may be, the holding is not adverse. If, however, the occupant takes possession, believing the land to be his up to the mistaken line, and claiming title to it, so holds, the holding is adverse. The intent to claim title up to the line is an indispensable element of adverse holding; the claim of right must be as broad as the possession. Simple acquiescence, or lying by without objection for the statutory period, in case of such adverse holding, binds the party so lying by to the line, though not the true line. *Watrous v. Morrison*, 139.

6. "NOTORIOUS," as used in defining an adverse holding, means that the possession or character of the holding possesses such elements of notoriety that the owner may be presumed to have notice of it and of its extent. To declare to the jury that the adverse holding must be asserted at all times and in all places, whenever necessary to make such claim generally known and understood, is calculated to mislead, by leaving it to the jury to decide at what times and places it is necessary to make such claim generally known and understood. *Watrous v. Morrison*, 139.
7. POSSESSION OF LAND IS NOT PRIMA FACIE ADVERSE to the true owner. *Normant v. Eureka Co.*, 45.
8. THE POSSESSION OF A PURCHASER AT A SHERIFF'S SALE WHO HAS NOT TAKEN OUT A DEED, or of any other purchaser who has made payment in full of the purchase price, and who has taken and retained possession, is presumed to be in his own right, co-extensive with his purchase, and adverse to the holder of the legal title. If the possession of such purchaser is continuous for the statutory period without recognition of, or subordination to, the legal title, the vendor's right of entry is barred. *Normant v. Eureka Co.*, 45.
9. PRESCRIPTIVE TITLE.—Adverse possession held until the claim of title has ripened into a fee necessarily destroys all outstanding legal titles. *Normant v. Eureka Co.*, 45.
10. THE POSSESSION OF A MERE TRESPASSER is confined to the premises actually occupied by him, but the possession of one claiming under color of title is co-extensive with the boundaries described in the written instrument under which he claims title. *Normant v. Eureka Co.*, 45.
11. PRESCRIPTIVE TITLE TO LAND COVERED BY TIDEWATER cannot be acquired when the title is vested in the state, and it is incompetent to make any grant thereof. *Sollers v. Sollers*, 404.
12. ADVERSE POSSESSION MAY BE BROKEN only by the act of the true owner, or the intrusion of a stranger, or the abandonment of the premises by the occupant himself. *Normant v. Eureka Co.*, 45.
13. ADVERSE POSSESSION IS NOT INTERRUPTED by an unknown intrusion of strangers unless continued for such a time as to become an assertion of right. If such intrusion is known, but not submitted to, nor acquiesced in, but is forthwith remedied by legal process, it does not amount to an interruption of the continuous possession. *Normant v. Eureka Co.*, 45.
14. TO REBUT A CLAIM OF ADVERSE POSSESSION it is competent to prove that the claimant was put in possession under a writ of assistance at a date later than that on which he alleges his adverse possession commenced, and also to show his admissions, under oath or otherwise, that the land was another's. *Lewis v. Watson*, 82.

See BOUNDARIES, 3, 6; PARTITION, 4, 5, 7; TRUSTS, 1; WITNESSES, 4.

ADULTERY.

See MARRIAGE AND DIVORCE, 1, 2

AFFIDAVITS.

See TAXES, 4.

AGENCY.

1. **A LOAN AGENT IS NOT AUTHORIZED TO RECEIVE PAYMENT** of a loan payable in another state where the lender resides, and when the agent has not in his hands either the note or the mortgage given to secure its payment. *Security Co. v. Graybeal*, 311.
 2. **PAYMENT OF NEGOTIABLE PAPER TO AN AGENT** who does not have it in his possession is at the peril of the payor, unless he can prove that the agent had special authority from the owner to receive such payment, or that such agent had been represented by the owner to have such authority. *Security Co. v. Graybeal*, 311.
 3. **THE RATIFICATION** of an unauthorized act makes the principal liable in an action of tort for an injury resulting from the negligence of an agent in doing the act. *Nims v. Mount Hermon etc. School*, 467.
- See CORPORATIONS, 5; DAMAGES, 2; EVIDENCE, 4; HUSBAND AND WIFE, 5; INSURANCE, 1-3, 22; SALES, 12**

AGISTMENT.

See LIENS, 2.

ALIMONY.

See JUDGMENTS, 22; MARRIAGE AND DIVORCE, 4.

AMENDMENTS.

See COURTS; JUDGMENTS, 18; MUNICIPAL CORPORATIONS, 8; PLEADING, 14; STATUTES.

ANIMALS.

See SALES, 6.

ANSWER.

See PLEADING 4.

APPEAL.

1. **SEPARATE FINDINGS.**—The fact that the trial court fails to find the conclusions of law and of fact separately is not ground for reversal on appeal unless it appears that the appellant has suffered prejudice thereby. *Monaghan Bay Co. v. Dickson*, 704.
2. **WHETHER A TRIAL COURT ERRED** in excluding a certificate of a survey cannot be shown to an appellate court, unless the substance of the certificate is disclosed by the record. If it is not so disclosed, the presumption is that the trial court ruled correctly. *Arneson v. Spawn*, 783.
3. A judgment will not be reversed for the refusal to instruct the jury on propositions of law not involved in the case upon the evidence before the court. *Arneson v. Spawn*, 783.
4. **INSTRUCTIONS.**—A statement in a motion for a new trial as embodied in a bill of exceptions, to the effect that the court erred in refusing to

- give certain instructions, is not proper evidence that they were duly presented to the trial judge, and such instructions cannot be considered on appeal. *Watrous v. Morrison*, 139.
5. JURY TRIAL.—HARMLESS INSTRUCTION.—A judgment will not be reversed on an erroneous instruction when it appears affirmatively that the defeated party was not injured by the error. *Gray v. Merriam*, 172.
 6. JURY TRIAL.—IMPROPER ARGUMENT.—If counsel, in arguing before the jury, improperly calls attention to the financial condition of the parties, and, on objection being made, the court tells him to keep within the record, and he thereupon desists from his improper course, the judgment will not be reversed unless it appears that the losing party was injured by such reference. *Monmouth Mining etc. Co. v. Erling*, 187.
 7. SUFFICIENCY OF COMPLAINT.—All minor defects in a complaint, not challenged in the trial court, are cured by verdict, and the complaint must stand on appeal, unless it contains some fault affecting in a very material degree the cause of action, as the omission of a fact essential to its existence. *Pennsylvania Co. v. Congdon*, 251.
 8. EVIDENCE.—The exclusion, on an erroneous ground, of a question is entirely immaterial when the bill of exceptions shows that the witness has, without objection, both before and after such exclusion, testified fully as to the point covered by such question. *Watrous v. Morrison*, 139.
 9. MOTIONS.—ERROR IN FAILING TO DETERMINE.—A failure on the part of the trial court to determine the second branch of a motion to strike out one defense, and make another more definite and certain, is material error, for which a reversal of the judgment may be had on appeal. *National Distilling Co. v. Cream City Importing Co.*, 902.
 10. DIRECTING JUDGMENT.—A case made containing all the pleadings, the general verdict, the special findings, the motions for judgment, and for a new trial, and so much of the proceedings as may be necessary to present the error complained of, is sufficient to authorize the appellate court to direct what judgment the lower court should have rendered in the case. *Berry v. Kansas City etc. R. R. Co.*, 371.
 11. DIRECTING JUDGMENT.—If special findings are returned by a jury, under the direction of the trial court, the appellate court may direct what judgment shall be rendered upon such findings, when they are not excepted to as against the facts. *Berry v. Kansas City etc. R. R. Co.* 381.
 12. REVIEW OF ERROR HOW SECURED.—To bring an alleged error before the appellate court for review it must, in general, be first brought to the attention of the trial court, so that, if error in fact exists, it may be corrected in that court. *Ashmead v. Reynolds*, 238.
 13. NEW TRIAL.—Upon a hearing of a motion after judgment a motion for a new trial is not essential to a review on appeal. *Dreese v. Myers*, 336.
 14. NEW TRIAL.—A motion for a new trial is not essential to a review on appeal of proceedings upon a motion to set aside a sale of land. *Dreese v. Myers*, 336.
 15. NEW TRIAL.—PRACTICE.—Refusal to grant a new trial on the facts is not ground for review on appeal. *Bickley v. Commercial Bank*, 721.
- See FRAUD; JUDGMENTS, 1, 6, 8, 9; JURISDICTION, 1; LIBEL, 2.

ARGUMENT.

See APPEAL, 6.

ARREST.

See FALSE IMPRISONMENT; MASTER AND SERVANT, 17; RAILROADS, 15, 16.

ASSESSMENT.

See INSURANCE, 29, 30, 32; MUNICIPAL CORPORATIONS, 14-16.

ASSESSORS.

See OFFICERS, 9.

ASSIGNMENT.

See DOWER, 2-4; INSURANCE, 5, 6, 8, 10, 20; MORTGAGES, 2, 3; SETOFF, 2, 3; SUBROGATION; ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

DEBTS AND OTHER PERSONAL PROPERTY FOLLOW THE PERSON OF THEIR OWNER—CONFLICT OF LAWS.—AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS MADE IN ANOTHER STATE by a resident thereof, with preferences among foreign creditors, if valid where made, is also valid in this state, unless detrimental to its citizens. Hence an assignment for the benefit of creditors, executed in Iowa, takes precedence over a garnishment subsequently levied in Illinois, at the instance of a resident of Ohio, to attach indebtedness due from a resident in Illinois to the assignor in Iowa. *Consolidated Tank Line Co. v. Collier*, 181.

See CONTRACTS, 10; FRAUDULENT CONVEYANCES, 1, 2; SETOFF, 2-4.

ASSOCIATIONS.

See INSURANCE, 27-32.

ATTACHMENT.

1. ABUSE OF PROCESS.—A party is not permitted to take out a writ of attachment, knowing it to be invalid, and issued upon an affidavit confessedly defective, and attach property under it not subject to levy, and thus gain information or evidence upon which to base a proper writ, and sustain that writ by such means. The evidence thus obtained is not competent for any purpose, and the party having possession thereof is bound to surrender it, and make proof that he has surrendered the whole thereof, so that it may not be used by him or any one else for any purpose. *Rosenthal v. Circuit Judge*, 535.
2. BOOKS OF ACCOUNT.—Books of account and trial balances are not property of such tangible character that they can be subjected to attachment. They may be evidences of debt, but their seizure is not the attaching of the debt itself. They are not so intimately connected with the demands charged therein that the seizure of the books is equivalent to the seizure of the demands, and there is no means by which such demands can be transferred by a direct levy and sale. *Rosenthal v. Circuit Judge*, 535.
3. A GARNISHMENT OF A WAREHOUSEMAN HAVING PERSONAL PROPERTY OF THE DEFENDANT IN HIS POSSESSION charges such warehouseman with the responsibility of retaining the property as in custody of the law, in order that it may be applied to the satisfaction of the debt on which the garnishment was placed, and therefore excuses the delivery of such

property to the owner whose interest therein has been garnished. *Cooley v. Minnesota etc. Ry. Co.*, 609.

4. **AN ATTACHMENT IS NOT ABATED BY THE DEATH OF THE DEFENDANT.** *Dow v. Blake*, 156.
5. **PLEDGE AND GARNISHMENT.**—If a pledge is effected it is not necessary that a creditor be given notice thereof, and his levy of a garnishment before he has such notice cannot give him a lien paramount to the rights of the pledgee. *Cooley v. Minnesota etc. Ry. Co.*, 609.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

ATTORNEY AND CLIENT.

1. **WILLS—ATTORNEY AS WITNESS TO—COMPETENCY TO TESTIFY.**—An attorney who drafts a will, and signs it as a witness at the request of the testator, may testify to any matter in relation to the will and its execution of which he acquired knowledge by virtue of his professional relation. *McMaster v. Scriven*, 828.
2. **AN ATTORNEY WHO DRAFTS A MORTGAGE** and signs it as a witness is entitled to testify to what occurred at the time of its execution. *Monaghan Bay Co. v. Dickson*, 704.

ATTORNEY'S FEES.

See NEGOTIABLE INSTRUMENTS, 2.

BAILMENT.

1. **A GRATUITOUS BAILEE IS LIABLE, AS A GENERAL RULE, FOR GROSS NEGLIGENCE ONLY.** *Gray v. Merriam*, 172.
2. **GROSS NEGLIGENCE AS APPLIED TO GRATUITOUS BAILERS** is nothing more than the failure to bestow the care which the property in its situation demands. *Gray v. Merriam*, 172.

See BANKS, 5, 6.

BALLOTS.

See ELECTIONS.

BANKS.

1. **CERTIFICATE OF DEPOSIT—PAROL EVIDENCE TO VARY.**—When, in an action against an incorporated bank to recover money deposited therein, it appears that the money was paid to the president of the defendant bank, who had previously been manager of a private bank, and who gave the plaintiff a certificate of deposit signed by him as "manager," certifying that the plaintiff had "deposited with him as manager" the sum claimed, but in no way referring to any bank, parol evidence is not admissible to show that such bank president assured the plaintiff depositor at the time that the money would be deposited with the defendant bank, and that the certificate was intended as evidence of such fact, in the absence of proof that such bank president had authority to receive deposits or make such contract, or had ever been designated or had signed his name as manager of the defendant bank. Nor does the fact that the action is not brought on the certificate render such evidence admissible, because as soon as it appears that the contract is in writing the parties are limited to the written evidence of its terms. *Bickley v. Commercial Bank*, 721.

2. **LIABILITY ON CERTIFICATE OF DEPOSIT.**—When, in an action against an incorporated bank on a certificate of deposit to recover the sum named therein, there is nothing on the face of such certificate to show that the bank is liable for the amount, except that it is signed by the president of such bank as “manager,” the word “manager” after his name is not evidence that he had authority, or was contracting for the bank, in receiving the deposit. *Bickley v. Commercial Bank*, 721.
3. **LIABILITY ON CERTIFICATE OF DEPOSIT.**—When, in an action against an incorporated bank to recover money paid to its president, who gave the depositor a certificate of deposit signed by him as “manager,” certifying that the depositor had deposited with him as “manager” the sum claimed, but in no way referring to any bank, the defense is that the money was deposited to the credit of such bank president as “manager,” and not to the credit of the plaintiff, it is error to charge that if it was paid to such president to be deposited in his bank, and was so deposited, the bank is liable, though it was not his duty to receive deposits, without qualifying the charge to the effect that such bank would be liable only in case the money went into its custody and control as the money of plaintiff. *Bickley v. Commercial Bank*, 721.
4. **A BANK WITH WHICH SECURITIES ARE DEPOSITED FOR SAFEKEEPING,** and which is accustomed to receive such deposits, is liable for any loss thereof occurring through the want of that degree of care which good business men should exercise in keeping property of such value. *Gray v. Merriam*, 172.
5. **A BANKER ACTING AS BAILEE, WITHOUT REWARD, IN THE CARE OF SPECIAL DEPOSITS** is bound to exercise such reasonable care as men of common prudence usually bestow for the protection of their own property of similar character. *Gray v. Merriam*, 172.
6. **A BANK HOLDING BONDS AS COLLATERAL IS NOT A GRATUITOUS BAILEE.** The bailment is for the mutual benefit of both the bailor and the bailee. *Gray v. Merriam*, 172.
7. **NEGLECTANCE.**—A BANKER ACCUSTOMED TO RECEIVE SPECIAL DEPOSITS, and who, on ascertaining that his assistant cashier, who had access to the special deposits, was speculating on the board of trade, made no examination to ascertain whether he was using moneys which did not belong to him, and, on again being warned of such speculations, made an examination of the books and securities of the bank, but no examination as to the special deposits, is guilty of gross negligence, and answerable for the special deposits stolen by such assistant. *Gray v. Merriam*, 172.
8. **DEPOSITS—AUTHORITY TO RECEIVE—BURDEN OF PROOF.**—In an action against a bank to recover a deposit paid to its president as “manager,” the burden of proof is upon the depositor to show that such president has authority, express or implied, to receive deposits, and that the deposit in suit was actually received by the bank as the money of the plaintiff depositor. *Bickley v. Commercial Bank*, 721.
9. **EVIDENCE.**—In an action against a banker for loss of a special deposit, evidence that the bonds deposited had originally been deposited as collateral security, though they were not so held at the time of the loss, together with evidence that the assistant cashier had access to the bonds up to a date after some of them had been abstracted, and that they were finally stolen by him, is admissible to show the relation of the parties, and to enable the jury to determine whether, under the circumstances, reasonable care had been exercised. *Gray v. Merriam*, 172.

BASTARDY.

See CREDITOR'S SUIT, 3, 4.

BENEFICIAL ASSOCIATIONS.

See INSURANCE, 27-32.

BICYCLES.

See HIGHWAYS.

BILLS AND NOTES.

See NEGOTIABLE INSTRUMENTS.

BILLS OF EXCEPTIONS.

See APPEAL, 4, 8.

BONDS.

See BANKS, 6; OFFICERS, 10.

BOOKS OF ACCOUNT.

See ATTACHMENT, 2; EVIDENCE, 9.

BOUNDARIES.

1. **BOUNDARIES BY AGREEMENT.**—An agreement to settle an uncertain or disputed boundary line need not be made if the line is run. Parties may agree orally to have an uncertain or disputed line run, and that it shall be the controlling line, and if they afterwards treat it as the permanent dividing line, by improving up to it, or otherwise, they are confined to that line. *Watrous v. Morrison*, 139.
2. **BOUNDARIES BY AGREEMENT—ESTOPPEL.**—An agreement between owners of adjoining lands to employ a common agent or surveyor to run a line and set up a boundary between them, when the dividing line is susceptible of being correctly located, does not estop either party, or their grantees, from showing an error in such line. *Watrous v. Morrison*, 139.
3. **BOUNDARIES BY AGREEMENT—ADVERSE POSSESSION.**—If, when parties in ejectment became the owners in fee of the land in dispute, there has not been established a true line or boundary between them, nor such an adverse holding by the defendant as is necessary to perfect his right under the statute of adverse claim up to that time, and they then agree to have the true boundary established by a survey, and to abide thereby, the jury may find that defendant's claim or holding was only intended to be to the true line, wherever it might be when legally established by proper methods. *Watrous v. Morrison*, 139.
4. **BOUNDARIES BY AGREEMENT—WHO BOUND BY.**—A nonconsenting owner is not bound by an agreement of the other owners as to a boundary line between adjoining lands, nor is any stranger thereto bound who may claim under such nonconsenting owner, but should a consenting owner afterwards become the owner of the entire tract in which he was interested, or of a distinct part of it, and continue to recognize the boundary line previously agreed and acted on by him and the owner of the adjoining land, such line is binding on him to the extent of his several ownership. *Watrous v. Morrison*, 139.

5. **AGREEMENT CONCERNING—BINDING, EFFECT OF.**—While the title to real estate cannot be transferred by verbal agreement, yet, if the boundary between contiguous lands is uncertain and disputed, the owners of such lands may agree upon a certain line as a permanent boundary line; and if the agreement is followed by actual occupation, according to such line as the boundary, the line is binding upon them and their successors in title as the boundary. Such line becomes binding, not upon the principle that the title to real estate can be passed by parol, but for the reason that the proprietors have, by such consent and conduct, agreed permanently upon the limits, or the extent, of their respective lands or property. *Watrous v. Morrison*, 139.
6. **IN ADVERSE CLAIMS OF PREMISES** lying upon an unsettled boundary the claim must be open, notorious, and continued, and must be asserted at all times in conversations between the parties in relation to such boundary. *Watrous v. Morrison*, 139.
7. **SURVEY, WHEN CONTROLS.**—In the sale of lands in sections, or subdivisions thereof, including lots, according to the government survey, the survey as actually made controls, if the monuments, corners, or lines actually established can be located or proved. Courses and distances yield to such corners and lines. *Watrous v. Morrison*, 139.
8. **ANCIENT PLATS AND SURVEYS.**—Monuments set at the time of an original survey on the ground, and named or referred to in the plat, are the best evidence of the true line. If there are none such, then stakes set by the surveyor to indicate corners of lots or blocks, or the lines of streets, at the time, or soon thereafter, are the next best evidence. A building or fence constructed according to such stakes, while they were present, becomes a monument after such stakes have been removed or disappeared, and the next best evidence of the true line. A resurvey that changes lines and distances, and purports to correct inaccuracies or mistakes in the old plat, is not competent for that purpose. *Racine v. Emerson*, 819.
9. **ANCIENT PLATS AND SURVEYS—EVIDENCE.**—In a case of disputed boundary, the testimony or acts of the surveyor who originally established it, and who pointed out the stakes set by himself to mark the lines after many years, accompanied by continued use and occupation in recognition of such lines, is not only proper, but strong evidence that such were the true lines, and is better evidence than a new survey made more than forty years afterwards, which changes such lines. *Racine v. Emerson*, 819.
10. **ANCIENT PLATS AND SURVEYS.**—The lines of streets and lots, as established by a city plat built upon and acquiesced in for more than forty years, cannot be destroyed or disturbed by a subsequent city survey made from the original monuments apportioning the blocks and streets after the first street is surveyed, and changing the lines of the street accordingly. *Racine v. Emerson*, 819.
See ADVERSE POSSESSION, 4, 5; EJECTMENT, 2, 3.

BUILDING CONTRACTS.

CONSTRUCTION.—When a building contract provides that final payment thereunder is to be made on the contractor's furnishing satisfactory evidence that no liens or unsatisfied claims exist on the work, the fact that no claims have been filed against it within one year after filing such

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contract affords the required evidence. *Monmouth Park Assn. v. Wallis Iron Works*, 626.

See EVIDENCE, 10.

BURDEN OF PROOF.

See BANKS, 8; DEEDS, 3; WILLS, 2, 3.

BURGLARY.

JUDGMENT, WHEN ERRONEOUS, BUT NOT VOID.—An indictment charging burglary in the first degree also includes burglary in the second degree, and although it is erroneous for the court to receive a verdict finding the accused guilty, as charged, without specifying the degree, and then sentence him to imprisonment only authorized in case of conviction for the highest degree, yet the judgment is not void. *In re Black*, 331.

CARRIERS.

1. **CONDITIONS IN TICKET.**—One accepting a ticket from a carrier is bound by the conditions therein, though she did not and could not read it. It is her duty to ascertain its contents if she cares to know her rights. *O'Regan v. Cunard S. S. Co.*, 484.
2. **A CONTRACT SPECIFYING THAT THE VALUE OF PROPERTY DOES NOT EXCEED A SUM NAMED**, and that in the event of its loss through the negligence of a carrier the liability should be limited to such sum, if fairly and honestly made as a basis of the carrier's charges and responsibility, is a just and reasonable mode of securing the due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting him against extravagant and fanciful valuations, and is, therefore, valid. *Atair v. Northern Pac. R. R. Co.*, 588.
3. **CONFLICT OF LAWS—CONTRACT WITH COMMON CARRIER, WHERE DEEMED TO BE MADE, AND BY WHAT LAWS GOVERNED.**—If, in consideration of a sum paid, a receipt is given in Massachusetts stating that it is for the steerage passage of a person named in the receipt, by any steamer of a line in which there may be room for transportation on this ticket from Queenstown to Boston, that to secure passage, a notice of intention to embark must be given, and that, if the passenger should decline coming, the money will be returned, less commissions, and if the intended passenger gives notice of her intention to embark, and, before taking passage, surrenders the paper given in Massachusetts, and receives in place thereof a passenger's contract ticket stating the name of the vessel, the port of destination, the date of sailing, and giving the full details of the contract, including certain conditions exempting the carrier from liability for injuries, though received by the passenger from its negligence, this last ticket takes the place of the prior papers, and becomes the contract between the passenger and the carrier, and if the conditions of exemption from liability are valid in the place where the ticket was issued, then the passenger cannot recover for negligence, though such conditions were invalid by the law of the state where the money was paid and the original receipt therefor given. *O'Regan v. Cunard S. S. Co.*, 484.
4. **CONFLICT OF LAWS.—A STIPULATION RELIEVING A CARRIER FROM LIABILITY FOR NEGLIGENCE**, though against the policy of our law, is not

immoral or illegal, and, if valid in another country where it was made, will be enforced by our courts. *O'Regan v. Cunard S. S. Co.*, 484.

See RAILROADS, 13-19.

CERTIFICATES OF DEPOSIT.

See BANKS, 1-3; EVIDENCE, 7.

CERTIORARI.

1. CERTIORARI LIES TO REVIEW THE PROCEEDINGS OF THE COMMON COUNCIL OF A CITY in removing a member of the board of fire commissioners where such removal is authorized to be made for sufficient cause, and after charges have been preferred and a hearing given to the accused officer. *State v. Duluth*, 595.
2. ON CERTIORARI THE COURT WILL CONSIDER THE EVIDENCE, not for the purpose of weighing conflicting testimony to ascertain the preponderance, but merely to ascertain whether there was any evidence at all to sustain the decision of the inferior tribunal. *State v. Duluth*, 595.

CHARTER.

See MUNICIPAL CORPORATIONS, 2, 3.

CHattel MORTGAGES.

See FIXTURES, 4; LIENS, 2; PAYMENT, 2.

CHECKS.

See TENDER.

COLLATERAL ATTACK.

See ADOPTION, 16; EVIDENCE, 11; EXECUTORS AND ADMINISTRATORS, 2; INFANTS, 1-4.

COLLATERAL SECURITY.

See BANKS, 9; NEGOTIABLE INSTRUMENTS, 8; PLEDGE, 1, 2.

COLLISIONS.

See RAILROADS, 25.

COMBINATIONS.

See CONSPIRACY; MONOPOLIES, 1.

COMMERCE.

See INTERSTATE COMMERCE.

COMMISSIONERS.

See PARTITION, 10.

COMMON COUNCIL.

See CERTIORARI, 1.

COMMON LAW.

See CONFLICT of LAWS; DEDICATION; LIENS, 1; SETOFF, 1.

COMPLAINT.

See PLEADING, 1, 2.

COMPOUNDING FELONY.

1. **EMBEZZLEMENT—RIGHT TO RECEIVE MONEY IN PAYMENT FOR.**—A master has the right to receive money from his servant or from the wife of the latter, or from a third person, in payment for money embezzled by such servant, so long as the master does not promise, either expressly or by implication, not to prosecute for the crime. *Miller v. Minor Lum-ber Co.*, 524.
2. **COMPOUNDING FELONY—VOID NOTE.**—An agreement to stifle a criminal prosecution, or to withhold proof therein, so as to obstruct the course of public justice, or to conceal a felony, is absolutely void, and no recovery can be had upon a note given in consideration thereof. *Friend v. Miller*, 340.

CONDEMNATION.

See EMINENT DOMAIN.

CONFLICT OF LAWS.

- IF A CAUSE OF ACTION ARISES IN ONE STATE** under the common law as there understood and administered, it may be enforced in another state though it does not constitute a cause of action by the law of the latter state, where the variance in the laws of the states does not amount to a fundamental difference of policy. Hence, if personal injuries sustained in another state, and for which the plaintiff seeks to recover in this state, were suffered under circumstances such that in this state they would be attributed to the negligence of a fellow-servant, and recovery against the common employer denied, recovery therefor may be had in this state if by the law, as understood in the state where the injuries were so received, they are not attributed to the negligence of the fellow-servant, but are regarded as the result of a wrong for which the master is answerable. *Walsh v. New York etc. Ry. Co.*, 514.
- See ASSIGNMENT FOR THE BENEFIT OF CREDITORS; CARRIERS, 3, 4; INSUR-ANCE, 2, 3; MARRIAGE AND DIVORCE, 6.**

CONGRESS.

See PUBLIC LANDS, 2.

CONSIDERATION.

See CONTRACTS, 2, 3, 8; NEGOTIABLE INSTRUMENTS, 3-5; SPECIFIC PERFORM-ANCE, 6.

CONSOLIDATION.

See CORPORATIONS, 8; RAILROADS, 1, 2.

CONSPIRACY.

1. **UNLAWFUL COMBINATION—WHAT CONSTITUTES.**—An act lawful in an individual can be the subject of civil conspiracy when done in concert only when there is a direct intention that injury shall result from it, or when the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals, and when such prejudice

or oppression is the natural and necessary consequence. *Cote v. Murphy*, 686.

2. AGREEMENTS OR COMBINATIONS ARE NOT UNLAWFUL so as to constitute conspiracies unless they are for acts or omissions, whether as ends or means, which would be unlawful apart from agreement. *Cote v. Murphy*, 686.
3. INTERFERENCE WITH THE FREE EXERCISE OF ANOTHER'S TRADE OR OCCUPATION or means of livelihood by fraud or force, such as preventing people, by threats or intimidation, from trading with or continuing him in their employment is an actionable wrong. *Lucke v. Clothing Cutters' etc. Assembly*, 421.
4. COMBINATION OF EMPLOYERS TO RESIST ADVANCE IN WAGES.—When workmen engaged in building trades lawfully combine to artificially advance wages by reducing the hours of labor, and associations of employers in such trades combine and agree not to sell materials to contractors who concede to the demands of the workmen, and to induce other dealers by all lawful means not to furnish such materials, such associations are not liable in damages for conspiracy to one who aids the striking workmen by selling materials to them and to other contractors, and who, by reason of the combination of such associations, is not able to procure all the materials he can dispose of. The fact that such associations inform dealers that they will not buy from them if they furnish materials to any one who is aiding such workmen is not such coercion or threat as renders their combination a conspiracy. *Cote v. Murphy*, 686.
5. COMBINATION OF EMPLOYERS not to force down the price of labor, but to resist, by all lawful means, a combination of employees to artificially advance wages by reducing the hours of labor is not a conspiracy. *Cote v. Murphy*, 686.
6. A COMBINATION OF DEALERS containing no elements of an intent to restrain trade for the purpose of greed or profit, or of malice, is not an unlawful conspiracy. *Cote v. Murphy*, 686.

CONSTRUCTION.

See CONTRACTS, 1; STATUTES, 1, 2.

CONTRACT.

1. CONSTRUCTION.—A written contract should be construed according to the obvious intention of the parties, notwithstanding clerical errors or omissions therein which can be corrected by perusing the whole instrument. *Monmouth Park Assn. v. Wallis Iron Works*, 626.
2. CONSIDERATION.—MORAL OBLIGATION to pay money or perform a duty is a good consideration for a subsequent express promise to do so, even if there was originally no legal obligation to perform. *Ferguson v. Harris*, 731.
3. A CONTRACT WITH A WATER COMPANY IS NOT WITHOUT CONSIDERATION, IF IT is for the payment of a certain sum on the extension of the water system to a specified locality, and such extension is made in consequence of the contract; nor is the contract rendered void by the fact that the municipality, as well as private persons, also paid the water company for water furnished by it to the same locality. *Muscantine Water Co. v. Muscantine Lumber Co.*, 284.

4. **WANT OF MUTUALITY** in a contract is no defense to an action thereon, if it was in the nature of a continuing offer which the other contracting party has accepted, and he has performed every thing which the contract left him the option of performing. *Muscatine Water Co. v. Muscatine Lumber Co.*, 284.
 5. **A CONTRACT NEED NOT BE SIGNED BY BOTH PARTIES.**—It is sufficient that it is signed by one, and accepted and performed by the other. *Muscatine Water Co. v. Muscatine Lumber Co.*, 284.
 6. **CONTRACT FOR BENEFIT OF THIRD PERSON—PRIVITY—NOVATION.**—An agreement between father and son, to which a daughter is a stranger, that in consideration of the revocation by the father of his will in favor of such daughter, and the devise of the same property to such son, the latter is to pay her a certain sum monthly, so long as she shall live, cannot be enforced by her in an action at law. Such agreement cannot be enforced on the law side of the court, either on the ground of novation or as a trust. *Linneman v. Moross*, 528.
 7. **CONTRACT FOR BENEFIT OF THIRD PERSON—PRIVITY.**—A promise made by one person to another for the benefit of a third, who is a stranger to the consideration, cannot be enforced by the latter. *Linneman v. Moross*, 528.
 8. **CONTRACT FOR THE BENEFIT OF A THIRD PERSON, WHEN VOID.**—If, in a contract between two persons, one promised the other to do some thing for the benefit of a third person, and the promise has no relation to the thing to be done, nor to the stranger to be benefited, he cannot, by action, enforce such promise. When there is nothing but a promise, no consideration from the stranger, and no duty or obligation to him on the part of the promisee, he cannot sue upon it. *Jefferson v. Asch*, 618.
 9. **CONTRACT IN RESTRAINT OF TRADE.**—A contract made by a vendor on selling his business to a corporation that he will not engage in the business of manufacturing or selling fire alarm and police telegraph machines and apparatus, nor enter into competition with such corporation, either directly or indirectly, for the period of ten years, is illegal and void as being in restraint of trade, and not limited as to place, and as manifesting a purpose to prevent the manufacture and sale by the vendor of any instruments which would serve the same purpose as those made and sold by the corporation, and thus enable it more completely to control the market. *Gamewell Fire Alarm etc. Co. v. Crane*, 458.
 10. **A DEMAND FOR THE PERFORMANCE OF A CONTRACT IS NOT NECESSARY** to support an action to recover damages for its nonperformance, if the contractor from whom the performance was due upon demand had made an assignment for the benefit of creditors, and thereby disabled himself from performing his obligation. *Laybourn v. Seymour*, 579.
 11. **THE RESCISSION OF A CONTRACT IS JUSTIFIED** by the refusal of the other contractor to perform one of its essential terms, as where, upon contracting to pay weekly for goods delivered to him under the contract, he neglects, after notice, to make such payments. *McGrath v. Gegner*, 415.
- See ACTIONS; BUILDING CONTRACTS; CARRIERS, 2, 3; CORPORATIONS, 4; DAMAGES, 1, 4, 5, 7; HUSBAND AND WIFE, 9, 10; SALES; SPECIFIC PERFORMANCE.**

CONTRIBUTION.

See INSURANCE, 20, 21.

CONTRIBUTORY NEGLIGENCE.

See RAILROADS, 19.

CONVERSION.

See PLEDGE, 1, 2: Trover.

CORPORATIONS.

1. **SUBSCRIPTION TO STOCK.**—A TENDER TO A SUBSCRIBER OF THE STOCK for which he has subscribed is not a condition precedent to the maintenance of an action to recover the amount of his subscription. *Webb v. Baltimore etc. Ry. Co.*, 396.
2. **SUBSCRIPTION TO STOCK—STATUTE OF FRAUDS.**—A subscription for stock in a corporation is not a contract for the sale of goods, wares, or merchandise, and is not within the statute of frauds. *Webb v. Baltimore etc. Ry. Co.*, 396.
3. **SUBSCRIPTION FOR STOCK IN A RAILWAY WHEN COMPLETED** to a point designated becomes final upon the performance of the condition, and is then enforceable. No further subscription or other act is essential to convert or change the original subscription into an unconditional and absolute subscription. *Webb v. Baltimore etc. Ry. Co.*, 396.
4. **A CORPORATE SEAL IS NOT ESSENTIAL** to the validity of a corporate contract. *Muscatine Water Co. v. Muscatine Lumber Co.*, 284.
5. **CORPORATE WRONGS—ULTRA VIRES.**—It is no defense to an action of tort to show that a corporation is not authorized by its charter to do wrong. If the corporation, by its officers or agents, unlawfully injures a person, whether intentionally or negligently, it cannot escape responsibility on the ground that its act is *ultra vires*. *Nims v. Mount Hermon etc. School*, 467.
6. **ULTRA VIRES.**—If an educational corporation, not authorized by its charter so to do, undertakes to run a public ferry, and while running it accepts a passenger for hire, it is answerable to him in an action of tort for a neglect of its duty in the management of such ferry, by which he was injured. *Nims v. Mount Hermon etc. School*, 467.
7. **EVIDENCE SUFFICIENT TO SHOW ENGAGING IN UNAUTHORIZED BUSINESS.** If an educational corporation does not take any vote in regard to a ferry, nor take out any license to operate it, but there is a bond filed conditioned that it will perform the duties of ferrymen, purporting to be executed in its behalf by a person named as its superintendent, and a ferry was operated under the direction of a student, who was also a trustee of the corporation, and receipts were turned over to its treasurer, and the person employed on the boat was paid by the paymaster of the corporation out of its funds, and another ferryboat was paid for by the same paymaster out of the same funds, and for six months such paymaster rendered monthly accounts to the treasurer of the corporation showing monthly receipts and expenditures on account of the ferry, these facts are sufficient to establish a ratification on the part of the corporation of the maintenance and operation of the ferry, and to render it answerable to any person received as a passenger thereon for hire, and injured by negligence in the management of the ferry. *Nims v. Mount Hermon etc. School*, 467.
8. **CONSOLIDATION—LIABILITY OF NEW CORPORATION.**—When one corporation goes entirely out of existence, by being incorporated into an-

other under a new name, without any arrangement or agreement made respecting the property and liabilities of the corporation which ceases to exist, the corporation into which it is merged succeeds to all its property, and is answerable for all its liabilities. In such case the debts of the old corporation become, by implication, the obligations of the new corporation. *Berry v. Kansas City etc. R. R. Co.*, 381.

2. A CORPORATION CANNOT BE DISSOLVED BY A COURT OF EQUITY unless the power to declare such dissolution has been conferred by statute. *Mason v. Supreme Court etc.*, 433.

See EVIDENCE, 5; LIMITATIONS OF ACTIONS, 1; RECEIVERS.

COSTS.

See NEGOTIABLE INSTRUMENTS, 7.

COTENANCY.

1. PARTNERSHIP—PRESUMPTION.—Tenants in common, engaged in the improvement or development of the common property, are presumed, in the absence of proof of a contract of partnership, to hold the same relation to each other during such improvement or development as before it began. As to third persons, they may subject themselves to liability as partners by a course of dealings, or by their acts and declarations, but, as to each other, their relation depends on their title, until, by their agreement with each other, they change it. *Butler Sav. Bank v. Osborne*, 665.
2. PARTNERSHIP—PRESUMPTION.—Cotenants may form a partnership for the purpose of operating the common property if they so agree; but in the absence of an agreement they are presumed to deal with each other, and the common property, as part owners, holding as cotenants, and liable to each other in account render or in equity, as the case may require. *Butler Sav. Bank v. Osborne*, 665.
3. DEVELOPMENT OF COMMON PROPERTY.—COTENANTS who agree to carry on mining or other operations on their lands, each contributing towards the expenses in proportion to his respective interest or estate in the land, are considered, with respect both to themselves and third persons, as the ordinary owners of land working their respective shares, responsible only for their own acts, subject to no laws of partnership, and possessing distinct rights in the property. *Butler Sav. Bank v. Osborne*, 665.
4. PURCHASE OF OUTSTANDING TITLE.—A conveyance to one of several cotenants, or a deed to one of two devisees of the same land, inures to the benefit of all who come in under the same title, and are holding jointly or in common. *Tanney v. Tanney*, 678.
5. PURCHASE OF OUTSTANDING TITLE.—As between persons having a joint or common interest in an estate, one of them cannot purchase an encumbrance or outstanding title, and set it up against the others for the purpose of depriving them of their interest. *Tanney v. Tanney*, 678.
6. PURCHASE AT TAX SALE of the common property by one cotenant in the name of a third person inures to the benefit of all the cotenants, and all that the purchaser can demand from them is contribution to the expense by which the common property has been relieved from embarrassment. *Tanney v. Tanney*, 678.

7. **PURCHASE AT TAX SALE—ESTOPPEL.**—Cotenants who accept the proceeds of a tax sale of the common property without knowledge that the estate has been purchased at such sale by their cotenant, and without any thing to excite suspicion or stimulate inquiry, are not estopped from avoiding the deed to the purchaser. In such case they need not make inquiry before accepting the money. *Tanney v. Tanney*, 678.
8. **PURCHASER AT TAX SALE—RESULTING TRUST—LIMITATIONS.**—A purchase of the common property by one cotenant at tax sale does not create a resulting trust, so as to prevent the other cotenants from maintaining ejectment after the expiration of the time named, in a statute providing that “no right of entry shall accrue, or action be maintained, to enforce any implied or resulting trust as to realty, but within five years after such trust accrued. *Tanney v. Tanney*, 678.
9. **CONVEYANCE OF TIMBER—PARTITION.**—When part of the owners of an undivided tract of timbered land convey their interest in the timber to a stranger, and subsequently join with the remaining owner in a deed in fee of the whole tract to a third person, without reservation, of the timber, and with notice to such grantee of its sale and conveyance, the vendee of such timber is substituted to the rights of his grantors, and may compel partition of the timber and land as a whole, notwithstanding the merger of the title, and may enforce his right to cut and remove the timber pursuant to the terms and conditions of his deed. *Mee v. Benedict*, 543.
10. **COTENANT'S LIABILITY FOR RENT.**—If a cotenant leases the common property at an agreed rent, and remains in exclusive possession thereof after the term for which his cotenant's share was let to him, he will be held to be in his character as a tenant, and therefore to be liable for rent. *O'Connor v. Delaney*, 601.

See PARTITION; PARTNERSHIP, 3.

COUNCIL.

See MUNICIPAL CORPORATIONS, 4-9.

COUNTERCLAIM.

See PARTITION, 8.

COUNTIES.

See HIGHWAYS, 2.

COURSES AND DISTANCES.

See BOUNDARIES, 7.

COURTS.

1. **JUDGMENTS—AMENDMENT OF.**—A court of record may, in criminal cases, at the same term of court in which the conviction is had, and before execution of any part of the sentence, change or amend the latter in form or substance. *In re Black*, 231.
2. **POWER TO CORRECT RECORDS.**—Courts of record have the power in criminal, as well as civil, cases, to correct clerical errors existing in the record of a previous term, if the clerk has failed or omitted to correctly record a judgment in fact rendered, and enough appears in other

parts of the record or official memoranda entered at the time of the proceeding of the court to clearly show that such mistake has been made. *In re Black*, 331.

3. **TERMS OF—POWER OF CLERK TO ADJOURN.**—The failure of a judge to attend and open his court upon the day appointed by law for the beginning of the term operates to lapse and end that term, and no further session of the court can be held until the next regular term, or until a special term is legally called. In such case the clerk of the court cannot, in the absence of statutory power, adjourn the court from day to day, or until a future day, and the arrival of the judge for the commencement of the term. *In re Terrill*, 327

See ADOPTION; JURISDICTION; PROCESS.

COVENANTS.

See DEEDS, 9, 10.

CREDITOR'S SUIT.

1. **THE NATURE, PURPOSE, AND SCOPE** of a creditor's bill is merely to bring into exercise the equitable powers of the court to enforce the satisfaction of a judgment by means of an equitable execution, because execution at law cannot be had. *Pierstoff v. Jorge*s, 881.
2. **RIGHT TO MAINTAIN.**—When a judgment debtor has fraudulently transferred personal property, and the fraudulent transferee has collected and appropriated to his own use money from the sale of part of such property, the judgment creditor may, after the return of an execution unsatisfied, maintain a creditor's bill in equity, though part of such property is yet in the possession of the fraudulent vendee, and might be levied upon. *Pierstoff v. Jorge*s, 881.
3. **ATTACK ON FRAUDULENT CONVEYANCE.**—In a suit by creditor's bill to collect a judgment recovered by a mother in bastardy proceedings against the father of her child, she may attack conveyances, made by him prior to the recovery of such judgment, on the ground that they were made to hinder, delay, and defraud her in the collection of any judgment which she might recover. *Pierstoff v. Jorge*s, 881.
4. **CREDITOR'S BILL TO COLLECT BASTARDY JUDGMENT.**—A creditor's bill may be maintained in equity to collect a judgment recovered by a plaintiff in bastardy proceedings against the father of her child, after she has resorted to and exhausted the specific remedy given by statute for the collection of such judgment without being able to make it available at law.—*Pierstoff v. Jorge*s, 881.

CRIMINAL LAW.

See BURGLARY; COURTS; EVIDENCE, 1; HABEAS CORPUS, 2; INDICTMENT; JURISDICTION, 3; LARCENY; RAILROADS, 6, 7; TRIAL, 2, 3, 10-12.

CROPS.

1. **SEVERANCE.**—A CONVEYANCE OF LAND either by voluntary deed or judicial sale, without reservation, does not pass the ripened crops then on the land, and a sale or mortgage of such ripened crops operates as a severance of them from the land. *First Nat. Bank v. Beegle*, 365.
2. **CROPS ON MORTGAGED PREMISES—TO WHOM BELONG ON FORECLOSURE.**—The sale by a mortgagor, prior to a foreclosure sale of the mortgaged

land, of a ripened crop standing thereon, passes the title to the crop to the vendee of the mortgagor as against the mortgagee or the purchaser at such foreclosure sale. *First Nat. Bank v. Beegle*, 365.

DAMAGES.

1. **DAMAGES ARE PRESUMED FROM THE BREACH OF A CONTRACT**, and though no substantial loss is shown, the injured party is entitled to nominal damages. *McGruth v. Gegner*, 415.
2. **PRINCIPAL AND AGENT—EXEMPLARY DAMAGES.**—If any wantonness or mischief on the part of an agent, acting within the scope of his employment, causes an additional injury in body or mind the principal is liable to make compensation for the whole injury suffered. *Lucas v. Michigan etc. R. R. Co.*, 517.
3. **EXEMPLARY DAMAGES.**—AN INJURY INTENSIFIED BY MALICE OR WILLFULNESS, or the oppressiveness or recklessness of the act, authorizes a recovery of damages commensurate with the injury when these elements are present, and as the added injury in consequence of their presence is not always susceptible of proof the matter is left to the sound discretion of the jury, but its attention should be called to the elements to be considered in this class of cases, and it should be cautioned against acting upon improper motives. *Lucas v. Michigan etc. R. R. Co.*, 517.
4. **LIQUIDATED DAMAGES.**—Stipulations for specified or liquidated damages on the breach of a contract to build within a limited time are enforceable. *Monmouth Park Assn. v. Wallis Iron Works*, 626.
5. **LIQUIDATED DAMAGES.**—When damages sustained by the breach of a single stipulation in a contract are uncertain in amount, and not readily susceptible of proof, then if the parties have expressly agreed upon a sum as the measure of compensation for the breach, and that sum is not disproportionate to the presumable loss, it may be recovered as liquidated damages. *Monmouth Park Assn. v. Wallis Iron Works*, 626.
6. **LIQUIDATED DAMAGES OR PENALTY.**—If it is doubtful from the whole agreement whether a sum named therein is intended as a penalty or as liquidated damages it should be construed as a penalty, because the law favors mere indemnity. *Monmouth Park Assn. v. Wallis Iron Works*, 626.
7. **WHEN LIQUIDATED AND WHEN A PENALTY.**—In determining whether a sum, which contracting parties have declared payable on default in the performance of their contract, is to be deemed a penalty or liquidated damages the agreement of the parties as ascertained from the whole instrument, if fair, must control. If they have provided for larger damages than the law permits, or have provided for the same damages on the breach of any one of several stipulations, when the loss resulting from such breaches must clearly differ in amount, or have named an excessive sum in a case where the real damages are certain or readily reducible to certainty by proof before a jury, or a sum which it would be unconscionable to award, under any of these conditions the sum designated is deemed a penalty. *Monmouth Park Assn. v. Wallis Iron Works*, 626.
8. **RAILROADS—NEGLIGENCE—EVIDENCE TO ENHANCE DAMAGES.**—In an action to recover damages for personal injuries received through the negligence of a railway company plaintiff may testify as to the number and character of his family if the law of punitive damages is given in the charge to the jury. *Johns v. Charlotte etc. R. R. Co.*, 709.

9. **DAMAGES FOR DEATH—ELEMENTS OF—EVIDENCE.**—While in an action to recover for death the probable earnings of the deceased are to be taken into account in fixing the damages, it is the duty of the plaintiff to show the earning power of the deceased, or give such evidence in regard to his business, business habits, and past earnings, as may afford some basis from which earning capacity may be fairly estimated, and in the absence of such evidence, it is error to charge the jury that it may, from the age, health, and habits of the deceased, estimate his earning capacity, and the pecuniary loss suffered by plaintiff. *McHugh v. Schlosser*, 699.
10. **DAMAGES FOR DEATH—MEASURE OF.**—The true measure of damages for wrongful death is the pecuniary loss suffered, without any solatium for mental suffering or grief; and the pecuniary loss is what the deceased would probably have earned by his labor, physical or intellectual, in his business or profession, if the injury that caused death had not befallen him, and which would have gone to support his family. In fixing this amount consideration should be given to the age of the deceased, his health, his ability and disposition to labor, his habits of living, and his expenditures. *McHugh v. Schlosser*, 699.
11. **DAMAGES—MEASURE OF.**—Nominal damages are those recoverable when legal right is to be vindicated from an invasion that has produced no actual present loss of any kind. If there has been any actual loss, then the damages must be compensatory, and for false imprisonment, or for trespass in improperly ejecting a passenger from a railroad train, such damages include, in addition to actual expenses incurred, compensation for loss of time, interruption of business, bodily or mental suffering, humiliation, and injury to feelings. *Duggan v. Baltimore etc. R. R. Co.*, 672.
12. **THE MEASURE OF DAMAGES FOR THE BREACH OF A CONTRACT TO SELL** and deliver property is the difference between the contract price and the market price at the time the delivery is to be made. *McGrath v. Gagner*, 415.
- See **LIBEL**, 3; **MALICIOUS PROSECUTION**, 4; **MERGER**, 2; **NUISANCE**, 2; **RAILROADS**, 18; **TROVER**.

DEATH.

See **ATTACHMENT**, 4; **DAMAGES**, 9, 10; **PARTNERSHIP**, 2.

DEBTOR AND CREDITOR.

See **FRAUDULENT CONVEYANCES**, 1.

DEBTS.

See **ASSIGNMENT FOR THE BENEFIT OF CREDITORS**.

DECLARATIONS.

See **EVIDENCE**, 4.

DEDICATION.

1. **STREETS.**—A DEDICATION OF LAND to public use as a street may be inferred from its use as a street for a much shorter period than would be required to create title by prescription. *Mason v. Sioux Falls*, 802.
2. **STREETS.**—A RIGHT TO THE USE OF LAND AS A STREET MAY BE ACQUIRED BY a dedication by the owner, either express or implied. In an implied

common-law dedication, it is necessary that there should be an appropriation of land by the owner to public use by some act or course of conduct from which the law will imply such intent. *Mason v. Sioux Falls*, 802.

See GRANTS 2.

DEEDS.

1. THE ACKNOWLEDGMENT OF A DEED BY A GRANTOR WHO DID NOT HIMSELF SIGN It is a sufficient recognition and adoption of the signature. *Lewis v. Watson*, 82.
2. DEED SIGNED FOR THE GRANTOR.—If the name of the grantor is signed to a deed by another in his presence, at his request, and as and for his act, the deed is as effective as if signed by himself. *Lewis v. Watson*, 82.
3. IF AN INTERLINEATION IN A DEED is in the same handwriting as the body, and accords with the manifest object of the deed, a fair presumption is that it was made before the acknowledgment of execution, and the burden of repelling this presumption must be assumed by the person seeking to avoid the deed. *Lewis v. Watson*, 82.
4. RECORD COPY AS EVIDENCE.—The record of a deed of standing timber is *prima facie* evidence of the sale of the timber and of the execution of the instrument. *Mee v. Benedict*, 543.
5. SIGNATURE—CONVEYANCE OF STANDING TIMBER.—The failure of a grantor in a deed of standing timber to affix a seal to the instrument does not render it invalid. *Mee v. Benedict*, 543.
6. CONVEYANCE OF TIMBER—IDENTITY OF LANDS.—A deed of standing timber, executed in another state, describing the lands by section, township, and range, so certified as to entitle it to record, and recorded in the county in which the grantor holds title to lands corresponding in description to those described in the deed, sufficiently identifies the lands. *Mee v. Benedict*, 543.
7. CONVEYANCE OF TIMBER.—Standing timber is an interest in lands that may be acquired by deed, and the fact that the deed contains a provision that such timber must be removed within a definite period does not prevent the title thereto from vesting in the grantee. *Mee v. Benedict*, 543.
8. A DEED, UNTIL DELIVERED, does not take effect. *Gore v. Dickinson*, 67.
9. RESTRAINING COVENANTS in a deed upon the right of the grantee to sell intoxicating liquors on the premises are valid, upon the theory that the grantor has a right, in disposing of his property, to prevent such a use by the grantee as may diminish the value of the remaining land or impair its eligibility for other uses. *Jenks v. Pawlowski*, 522.
10. RESTRAINING COVENANTS—WAIVER BY GRANTOR.—When a grantor conveys one parcel of land, with restrictions in the deed upon the right of the grantee to sell intoxicating liquors on the premises, and afterwards conveys adjoining land to a third person without such restrictions, he waives the right to insist upon the enforcement of the restrictions contained in the first deed, even though they were omitted from the second deed by mistake, if no proceeding has been taken to correct such mistake. *Jenks v. Pawlowski*, 522.
11. DEED OF HOMESTEAD—REFORMATION OF.—A son who accepts a deed of a homestead, signed by his father alone, by reason of erroneous advice that such deed would accomplish the intention of the parties, as con-

tained in a parol contract, that the son should support his parents during their life, and after their death take the homestead in fee, is entitled after his parents' death to a reformation of the deed, as against the grantor's other heirs, so as to convey the entire estate to him in fee. *Whitmore v. Hay*, 838.

See CROPS, 1; DURESS; HUSBAND AND WIFE, 7, 8; MORTGAGES, 1.

DE FACTO.

See OFFICERS, 1, 3-7; PROHIBITION, 2.

DEFINITIONS.

"Duly given or made." *Pierstoff v. Jorgea*, 881.

"Manager." *Bickley v. Commercial Bank*, 721.

"Notorious." *Watrous v. Morrison*, 139.

"Out of the state." *Larson v. Aultman etc. Co.*, 893.

Partnership. *Spaulding v. Stubbings*, 888.

Proximate cause. *Pennsylvania Co. v. Congdon*, 251.

Sale. *Foley v. Felrath*, 39.

DE JURE.

See OFFICERS, 3, 6, 7.

DELIVERY.

See DEEDS, 8; EXECUTION, 2.

DEMURRER.

See PLEADING, 3.

DEPOTS.

See RAILROADS, 20-22.

DESCENT.

See ADOPTION, 14.

DIRECTING VERDICT.

See APPEAL, 10, 11; NEGLIGENCE, 10.

DISSOLUTION.

See CORPORATIONS, 9; MUNICIPAL CORPORATIONS, 2; RECEIVERS.

DOMICILE.

1. THE DOMICILE OF EVERY PERSON AT HIS BIRTH IS THE DOMICILE of the person on whom he is then legally dependent, whether it be at the place of the birth or elsewhere. *Van Matre v. Sankey*, 196.
2. DOMICILE OF ORIGIN OF A MINOR CONTINUES, notwithstanding the death of his parents, though the child has been taken into another state, unless the domicile was changed by the consent of the parents, or of the last surviving parent. *Van Matre v. Sankey*, 196.
3. THE DOMICILE OF ORIGIN IN THE CASE OF LEGITIMATE CHILDREN is the domicile of the father, if living, and if not, that of the mother, and such domicile continues, unless changed by the parent during infancy, until the infant attains his majority, or perhaps until, after being emancipated by the parents, the infant acquires another. *Van Matre v. Sankey*, 196.

4. AN INFANT CANNOT, OF ITS OWN VOLITION, CHANGE ITS DOMICILE.
Van Matre v. Sankey, 196.

See ADOPTION, 15.

DOWER.

1. DOWER MUST BE SET OUT BY METES AND BOUNDS WHENEVER the property is capable of division. *Sanders v. McMillian*, 19.
2. AN ASSIGNMENT OF DOWER BY METES AND BOUNDS MAY BE DISPENSED WITH when, from the nature of the husband's interest or from the quality of the thing itself, an assignment in that manner is impracticable. An assignment of compensation in lieu of dower may then be made, and such assignment should be so made as to yield to the widow one-third of the rents and profits of the entire estate. *Sanders v. McMillian*, 19.
3. IN ASSIGNING DOWER THE VALUE OF THE LAND was by the common law estimated at the time of the assignment, and the widow thus shared the benefits of improvements made, as well as of other enhancements of the value, and was required to suffer loss resulting from unavoidable diminution in the value of the lands intervening between the death of her husband and the assignment of her dower. If the deterioration was due to the wrongful act of the heir, she was entitled to an action for her share, but it did not alter the manner of the assignment of her dower. *Sanders v. McMillian*, 19.
4. IN ASSIGNING DOWER TO A WIDOW IN LANDS ALIENATED BY HER HUSBAND she must be endowed according to the value of the estate at the time of his death regardless of any diminution or advancement resulting from the acts of the purchaser or otherwise, except that in Alabama she is not entitled to the advantage of improvements made by him. The dower will be assigned by metes and bounds instead of awarding the widow a compensation in money, though it appears that the lands, having been conveyed by her husband in his lifetime, subsequently diminished in value from the negligence of the purchaser not keeping the property in good repair and in not renewing the soil by proper fertilizers. *Sanders v. McMillian*, 19.

See MERGER, 1.

DRAINAGE.

See MUNICIPAL CORPORATIONS, 12.

DUPLICITY.

See INDICTMENT; LARCENY.

DURESS.

RATIFICATION.—A deed from a wife, secured through threats of a criminal prosecution against her husband for embezzlement from the grantee, is not void, but only voidable, and if she subsequently executes a quitclaim deed to the same premises upon a sufficient consideration, and with knowledge that she thereby waives her right to avoid the first deed, she ratifies it, and is estopped from having either or both deeds set aside in the event that her husband is prosecuted for embezzlements discovered after the execution of the second deed. *Miller v. Minor Lumber Co.*, 524.

See LANDLORD AND TENANT, 2.

EJECTMENT.

1. EVIDENCE.—A question put to party in ejectment, testifying in his own behalf as to whether or not he has ever admitted that the land in dispute did not belong to him, is properly excluded. Whatever in the nature of such an admission may have passed between such party and any one else is admissible to be proved by either party in the proper way, and, whatever may be testified to as having so passed, can be denied by either party, or explained by him by a statement of his recollection of what, if any thing, passed; but his opinion as to whether it constituted an admission is properly excluded from the jury. *Watrous v. Morrison*, 139.
2. EVIDENCE OF BOUNDARY.—A party in ejectment may testify as to his knowledge of any objection made by a deceased prior owner of the opposing party's title to a stated line as the boundary line of the land in dispute. *Watrous v. Morrison*, 139.
3. EVIDENCE OF BOUNDARY LINE.—In ejectment the defendant may testify as to a conversation had with the husband of the then owner of the land in dispute, in reference to the boundary line thereof, as such conversation may tend to show an intention on the part of the defendant to claim the land as his own up to the line to which he holds exclusive of any other right, and independent of such line being the true line. *Watrous v. Morrison*, 139.

See BOUNDARIES, 3; WITNESSES, 4.

ELECTIONS.

1. BALLOTS DEPOSITED IN THE WRONG BOX by the mistake or fraud of the election inspectors are valid, and should be counted. *State v. Horan*, 826.
2. EVIDENCE.—A package of ballots shown to have been tampered with after the election is of no value as evidence. *State v. Horan*, 826.

See OFFICERS, 7; QUO WARRANTO.

EMBEZZLEMENT.

See COMPOUNDING FELONY; DURESS.

EMINENT DOMAIN.

1. LEGISLATURE HAS NO POWER TO AUTHORIZE TAKING OF PRIVATE PROPERTY for a private use without the owner's consent, even upon the making of just compensation therefor. *Wisconsin Water Co. v. Winans*, 813.
2. PUBLIC USE and a legislative warrant of the necessity of the taking must coexist as conditions precedent to the right of condemnation of land under the exercise of the right of eminent domain. *Wisconsin Water Co. v. Winans*, 813.
3. PUBLIC USE—WHO DETERMINES WHAT IS.—Whether a particular use for which land is taken under the exercise of the right of eminent domain is public or not, is for the judiciary to determine. *Wisconsin Water Co. v. Winans*, 813.
4. PUBLIC USE—WHAT IS NOT.—A corporation organized to construct and maintain water works and connections for supplying a city with water cannot maintain proceedings to condemn lands not within the city limits for the purpose of laying its pipe lines, without proof

that it has a legal right to condemn land within such city, or has a right to construct or maintain water works or lay pipes therein, or to dispose of the water conveyed by the pipe line to the inhabitants of such city. Without this proof no public use is shown. *Wisconsin Water Co. v. Winans*, 813.

See LEGISLATURE.

EQUITY.

1. **STATUTE OF FRAUDS.**—AN AGREEMENT TO EXECUTE A MORTGAGE upon real property may be enforced in equity if the complainant has performed his part of the agreement by furnishing the money for which such mortgage was agreed to be given. *Baker v. Baker*, 776.
 2. **MISTAKE.**—If through mistake, on a sum being ascertained to be due from a partner to a firm, of which he is a member, he gives his note to his copartner for the whole of such amount, instead of for one-half thereof, equity will grant relief, and require the repayment of any sum paid in excess of that equitably due. *Gould v. Emerson*, 501.
 3. **REMEDY AT LAW—ESTOPPEL.**—The mere fact that one has a remedy at law is not enough to bar him from proceeding in equity, even when the question is properly raised by the pleadings, unless such remedy is an adequate remedy. *Pierstiff v. Jorge*, 881.
 4. **PRESCRIPTIVE TITLE; WHEN WILL BE AIDED IN EQUITY.**—One who has held possession of land under such circumstances, and for such time, that he has thereby acquired title thereto by prescription, may call upon a court of equity to establish such title, and to give him evidence thereof by entering a decree quieting his title against the person in whom the title appears to be vested by the record, if he has at the time no adequate legal remedy, but if there is an action pending against him in a court of law wherein his title may be put in issue and established, there is no equity in his bill to quiet title, and it will be dismissed. *Normant v. Eureka Co.*, 45.
- See CORPORATIONS, 9; CREDITOR'S SUIT; ESTOPPEL, 2; FRAUDULENT CONVEYANCES; NEGOTIABLE INSTRUMENTS, 3; PLEADING, 3; RECEIVERS; SETOFF, 5; SPECIFIC PERFORMANCE.

ERROR.

See APPEAL; BURGLARY.

ESTOPPEL.

1. **CLAIMING UNDER COMMON SOURCE OF TITLE.**—Where both parties to an action to recover possession of real property claim under a common source of title neither is in a position to impeach it. *Lewis v. Watson*, 82.
 2. **PLEADING.**—An estoppel *in pais*, constituting the basis of a right of action and ground of relief, or relied upon as a defense, must be pleaded in equity cases, but need not be pleaded in actions at law. *Dean v. Crall*, 571.
 3. **NO RATIFICATION OR ESTOPPEL CAN ARISE** when the act set up as such was done in entire ignorance of the material facts prompting action. *Tanney v. Tanney*, 678.
- See ADOPTION, 10; BOUNDARIES, 2; COTENANCY, 7; EXECUTION, 3; JUDGMENTS, 6, 11, 12, 15.

EVIDENCE.

1. **EVIDENCE THAT A DOG TRAINED TO FOLLOW THE TRACKS OF A HUMAN BEING** was, within a very short time after a homicide, put upon the tracks of a person to whom circumstances pointed as the guilty actor, and that the dog, as if following those tracks, went to the house of the defendant, where he is shown to have been that night after the killing, is competent to go to the jury with other testimony as a circumstance tending to connect him with the crime. *Hodge v. State*, 17.
2. **EVIDENCE OF COLLECTIVE FACTS.**—The answer of a witness, asked what improvements were on certain lands at a time designated, that "a right smart of improvements have been made in clearing and fencing," is a conclusion of facts, and as a collective fact is admissible. *Cosfer v. Scroggins*, 52.
3. **PRODUCTION OF PAPERS**—When a written instrument, such as a certificate of deposit, forming the basis of a cause of action, is in court, it may be called for without notice to produce, and evidence of payments of interest on such certificate is admissible to contradict testimony that the defendant had never paid interest on such certificates. *Bickley v. Commercial Bank*, 721.
4. **CORPORATIONS—DECLARATIONS OF AGENT AS EVIDENCE.**—A statement by a general agent of a corporation, in the course of his employment, as to a fact, within his official knowledge, touching the *status* of a matter intrusted to him, is admissible in evidence on behalf of the party with whom the corporation was dealing at the time. *Agricultural Ins. Co. v. Potts*, 637.
5. **PRESUMPTION OF INTENTION.**—The courts are bound to impute to men that intention which their acts and conduct disclose, and if a trade or labor union informs employers of men that in case a non-union man remains in their employment, all the labor organizations in the city will be informed that their business is a non-union one, the courts are bound to infer an intention to procure the discharge of such non-union man, and the consequent interference with his right to labor for the support of himself and family. *Lucke v. Clothing Cutters' etc. Assembly*, 421.
6. **PAROL TO VARY WRITING.**—The rule forbidding the introduction of parol evidence to contradict, add to, or vary a written instrument does not extend to evidence offered to show that a contract was made in furtherance of objects forbidden by statute, by common law, or by the general policy of the law. *Friend v. Miller*, 340.
7. **CERTIFICATE OF DEPOSIT—PAROL EVIDENCE TO VARY.**—A certificate of deposit promising to repay a certain sum of money at a time stated, with interest at a specified rate, cannot be explained or varied by parol evidence. *Bickley v. Commercial Bank*, 721.
8. **COURT RECORDS OF ANOTHER STATE.**—A record of proceeding of a court of another state or territory, duly authenticated as required by law, are admissible in evidence to show that such proceedings were had. *Friend v. Miller*, 340.
9. **ACCOUNT BOOKS, WHAT ARE NOT.**—A book kept by a loan agent showing the date and number of each loan, the name and address of the lender, and the place where the loan is to be paid, a description of the property mortgaged as security, the time when the loan is paid, and date of the remitting of the proceeds of the principal, is not a book of account, and is, therefore, not admissible in evidence in favor of bor-

rower for the purpose of proving the payment of the loan. *Security Co. v. Graybeal*, 311.

10. **BUILDING CONTRACTS—LETTER AS EVIDENCE.**—In an action to recover under a building contract, a letter written by the chief engineer of the builder after the completion of the work, and after the writer had left the employ of the builder, and without notice to him, is not admissible in evidence as a decision of a matter concerning the work, which, under the terms of the contract, was to be left to the decision of the chief engineer of such builder. *Monmouth Park Assn. v. Wallis Iron Works*, 626.
11. **JUDICIAL PROCEEDINGS—COLLATERAL ATTACK.**—Parties and privies to judicial proceedings cannot show their invalidity in collateral proceedings by bringing forward matter extraneous to the record. *Comegys v. Emerick*, 245.
- See **APPEAL**, 2, 4, 8; **ATTACHMENT**, 2; **BANKS**, 9; **BOUNDARIES**, 7-10; **CERTIORARI**, 2; **CORPORATIONS**, 7; **DAMAGES**, 9; **DEEDS**, 4; **EJECTMENT**, 1; **ELECTIONS**, 2; **HABEAS CORPUS**, 1; **LANDLORD AND TENANT**, 1; **SURETIES**, 4; **TRIAL**, 6; **WITNESSES**.

EXECUTION.

1. **EXECUTION SALES.—THE EXECUTION OF A SHERIFF'S DEED WILL BE PRESUMED** if the purchaser took possession of the land under his purchase and held it continuously thereafter in his own right for the period of thirty-five years. *Normant v. Eureka Co.*, 45.
2. **THE DELIVERY OF A SHERIFF'S DEED MAY BE PRESUMED** from the fact that it was given by him to the recorder of deeds, who took it to his office and recorded it, especially if it further appears that the grantee took and still holds possession of the lands conveyed, and the deed is in the possession of his personal representative. *Lewis v. Watson*, 82.
3. **EXECUTION SALE.—ESTOPPEL.**—The defendant in execution cannot dispute the title at an execution sale, as a general rule. *Normant v. Eureka Co.*, 45.
4. **EXECUTION SALE.—THE RETURN OF A SHERIFF** on a writ is not essential to the validity of his deed. *Lewis v. Watson*, 82.
5. **OFFICER ACTING BEYOND THE COUNTY.**—If lands situate in two counties are sold under a decree, from which sale a right of redemption exists, and a judgment creditor wishes to exercise his redemption right in such lands, and places his execution in the hands of the sheriff of one of such counties, that officer has power to levy upon and sell the lands in both counties, for otherwise it would be impossible for the judgment creditor to exercise his right of redemption at all. *Oldfield v. Eulert*, 231.
6. **EXEMPTION.—PARTNERS** cannot, during the existence of the partnership, claim an individual exemption in partnership property taken under legal process for partnership debts. *Aiken v. Steiner*, 58.
7. **EXEMPTION OF PARTNERSHIP PROPERTY.**—A sale of partnership property by one partner to the other cannot entitle the purchasing partner to retain the property as exempt from execution for the partnership debts. To so hold would be to sustain a transfer which must necessarily result in delaying, hindering, and defrauding partnership creditors. *Aiken v. Steiner*, 58.

8. **THE RIGHT OF REDEMPTION BEING PURELY STATUTORY** must be exercised in the manner prescribed by statute. *Oldfield v. Eulert*, 231.
9. **THE REDEMPTION OF PART OF A TRACT**, or of one of two or more tracts sold *en masse*, cannot be made. *Oldfield v. Eulert*, 231.
10. **REDEMPTION.—If Two or More Lots Are Sold Together** under execution, a judgment creditor who seeks to redeem from the sale must cause all the lots to be sold together under his execution, in like manner, in order to consummate the redemption, and if he sells them separately he abandons his redemption, and is regarded as making his sale wholly independent of it. *Oldfield v. Eulert*, 231.

See **CREDITOR'S SUIT**, 1; **JUDGMENTS**, 10; **PLEADING**, 2.

EXECUTORS AND ADMINISTRATORS.

1. **EXECUTOR'S SALE—TRUST WHEN ARISES.**—If an executor purchases indirectly of himself through a third person, the estate is held in trust by such executor for the heirs at law or other persons interested, who may have the trust declared upon proper application. *Comegys v. Emerick*, 245.
2. **EXECUTOR'S SALES—COLLATERAL ATTACK.**—If the record shows that an executor's sale was made to a third person, not disqualified from purchasing, the fact that the executor was the real purchaser must be shown by proof *dehors* the record, and the sale is not void, but voidable, and has full force and effect until set aside in proper proceedings. *Comegys v. Emerick*, 245.

EXEMPTION.

See **EXECUTION**, 6, 7; **HOMESTEAD**.

EXPERTS.

See **WITNESSES**, 1-3.

FALSE IMPRISONMENT.

1. If, upon the arrest of an offender, the arresting officers require him to pay a designated sum or to submit to the penalty of going to jail forthwith, they are without legal justification, but if, on the other hand, the offender offers to pay, and does pay, the sum named as a penalty, rather than be taken before a proper judicial officer, such offender only performs his legal obligation incurred for an unjustifiable act, and has no cause of action against the arresting officers. *Truiley v. Perkins*, 408.

See **DAMAGES**, 11.

FALSE REPRESENTATIONS.

See **ACTIONS**.

FELLOW-SERVANTS.

See **MASTER AND SERVANT**, 2-8; **RAILROADS**, 23-25.

FENCES.

See **ADVERSE POSSESSION**, 1; **RAILROADS**, 10-12.

FINDINGS.

See **TRIAL**, 8, 9.

FISHERIES.

1. PROPERTY IN FISH CANNOT be created by constructing a fence across a public tidewater cove, and thus preventing their escape therefrom. *Sollers v. Sollers*, 404.
2. TO COMPLETE RIGHT OF PROPERTY, IN FISH, an actual appropriation or mancipation must be made. The possession must be complete, and if, when taken, they are voluntarily restored to their native element, so that they can only be regained in like manner to that in which they were originally taken, the right of property is lost. *Sollers v. Sollers*, 404.
3. TIDEWATER.—A STATUTE FOR THE PROTECTION OF OWNERS OF ARTIFICIAL PONDS situated on their land, or lands of which they are in legal possession in the ownership of such fish, or eggs, or spawn of fish as may be put therein for breeding, does not apply to tidewater coves, the title to which is vested in the state. *Sollers v. Sollers*, 404.

FIXTURES.

1. TEST OF.—The chief test by which to determine whether an article is a fixture is to inquire whether the party annexing it intended it to be a permanent accession to the freehold. This intention is to be inferred from the nature of the article affixed, the relation and situation of the parties making the annexation, and the policy of the law in relation thereto, the structure and mode of annexation, and the purpose for which it was made. *Fifield v. Farmers' Nat. Bank*, 166.
2. MACHINERY PLACED IN A FACTORY WITH THE INTENTION THAT IT SHALL REMAIN as a part thereof, though attached by screws in such a manner that it may be removed, becomes a permanent fixture, and passes to a mortgagee of the premises, so that no lien or claim can be enforced in favor of the vendor of such machinery. *Fifield v. Farmers' Nat. Bank*, 166.
3. AGREEMENT WITH VENDOR DOES NOT AFFECT MORTGAGEE.—MACHINERY ANNEXED TO THE FREEHOLD IN SUCH A MANNER AND FOR SUCH A PURPOSE as to make it a fixture will not retain the character of personal property as against a mortgagee, because of an agreement between the vendor of the fixture, and the owner of the freehold, that such fixture shall remain the property of the vendor until paid for, if the mortgagee had no notice of such agreement. *Fifield v. Farmers' Nat. Bank*, 166.
4. CHATTEL MORTGAGE—ESTOPPEL.—THE ACCEPTANCE OF A CHATTEL MORTGAGE on certain fixtures does not estop the mortgagee from insisting that they are real estate, and subject to a real estate mortgage made in his favor. *Fifield v. Farmers' Nat. Bank*, 166.

FORECLOSURE.

See MORTGAGES, 5.

FORFEITURE.

See INSURANCE, 13-15; MUNICIPAL CORPORATIONS, 3; RECEIVERS.

FRAUD

FRAUD IN PROCURING A RECEIPT AND RELEASE.—If the plaintiff testifies that soon after a railway accident, and while he was suffering therefrom

and dazed and rattled thereby, he was taken to the office of the railway company, and asked what the damage to his clothing was, and on his stating what it was, two papers were presented to him, one of which he understood to be a bill for such clothing, and the other was said by an officer of the company presenting it to be a mere matter of form, and if he signs both papers without reading either, and accepts the sum named as damage to his clothing, and it turns out that the papers were a receipt for, and release of, damages sustained for personal injuries, this is sufficient evidence to submit to the jury of fraud in procuring the release and receipt, and their verdict to that effect will not be set aside in the appellate court. *Bliss v. New York etc. R. R. Co.*, 504.

See ELECTIONS, 1; FRAUDULENT CONVEYANCES; INSURANCE, 11; JUDGMENTS, 19; LANDLORD AND TENANT, 3; NEGOTIABLE INSTRUMENTS, 3-5, 7; PLEADING, 11; RELEASE, 2; SALES, 6; TRUSTS, 2.

FRAUDULENT CONVEYANCES.

1. **MORTGAGE—COMPOSITION WITH CREDITORS.**—A mortgage to secure payment of a composition with creditors is not void for fraud as against nonaccepting creditors if based upon a sufficient and valuable consideration, and executed to innocent mortgagees after an offer to the non-accepting creditors to include them therein. *Monaghan Bay Co. v. Dickson*, 704.
2. **MORTGAGE—ASSIGNMENT—PREFERENCE TO CREDITORS.**—A mortgage given to secure payment of a composition with creditors, not including all of the insolvent debtor's property and security debts payable in future is not tantamount to an assignment giving unlawful preferences, and is not void under the assignment law as against nonaccepting creditors. *Monaghan Bay Co. v. Dickson*, 704.
3. **UNDUE INFLUENCE.**—A COMPLAINT IN AN ACTION TO SET ASIDE A FRAUDULENT CONVEYANCE, alleging the relations of the parties, the great age and feebleness of intellect of the grantor, the persistent and long-continued importunities of the grantee, the gross inadequacy of consideration, together with the nature of the transaction, and the circumstances surrounding it, joined with general allegations of undue influence and fraud, is sufficient. *Ashmead v. Reynolds*, 238.
4. **WHEN ANNULLED.**—IF THERE IS GREAT WEAKNESS OF MIND in a person executing a conveyance, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity, upon proper and reasonable application of the injured party, or his representatives or heirs, will interfere and set the conveyance aside. *Ashmead v. Reynolds*, 238.

See CREDITOR'S SUIT, 2, 3; JUDGMENTS, 10.

GARNISHMENT.

See ATTACHMENT, 3, 5.

GIFTS.

See HUSBAND AND WIFE, 1, 3.

GOVERNOR.

See PARDONS, 1, 4.

GRANTS.

1. **PUBLIC LANDS, GRANT OF, FROM WHAT LANGUAGE IMPLIED.**—The words in an act of Congress, "the right of way for the construction of highways over public lands not reserved for public use is hereby granted," import an immediate transfer of interest, not a promise to transfer in the future, and when highways are located by competent authority or by public use, the dedication takes effect by relation as of the date of the act. *Wells v. Pennington County*, 758.
2. **PARTIES TO.**—THE PUBLIC is an ever-existing grantee capable of taking dedications for public use. Therefore, a general grant of a right of way over public lands for highway purposes cannot be avoided for want of a grantee. *Wells v. Pennington County*, 758.

See ADVERSE POSSESSION, 11.

GUARDIAN AND WARD.

See ADOPTION, 13, 15, 16.

GUESTS.

See INNKEEPERS.

HABEAS CORPUS.

1. **REVIEW OF ERRORS ON.**—Mere error or irregularities in court proceedings are not reviewable on *habeas corpus* for the discharge of a prisoner committed under process issued on final judgment of a court of competent jurisdiction. *In re Black*, 331.
2. **IF A PRISONER HAS BEEN PARDONED WITH CONDITION** that he leave the state, and has again been placed in prison without any judicial inquiry, on the ground that he has violated the condition of his pardon, he must be discharged on *habeas corpus*, if the court before which he is brought is not a court of original criminal jurisdiction, and without entering into a consideration whether he has complied with his pardon or not. Such discharge will not bar further proceedings instituted in a proper court for the purpose of there determining whether he should not be again imprisoned, because his pardon had become inoperative for his failure to comply with the condition upon which it was granted. *State v. Wolfer*, 582.

HEIRS.

See ADOPTION, 2.

HIGHWAYS.

1. **BICYCLES MAY BE EXCLUDED FROM PUBLIC HIGHWAYS** by authority of the legislature, if, in fact, they are dangerous to the general traveling public. *Twilley v. Perkins*, 408.
2. **BICYCLES, EXCLUDING FROM PUBLIC HIGHWAYS.**—If county commissioners are given full power and authority to make reasonable rules and regulations for the use of a bridge by the public, this authorizes them to enact a by-law forbidding any person from riding a bicycle or tricycle over such bridge, and such a by-law will be presumed to be reasonable, and the burden of proving that it is not so rests on the party denying its validity. *Twilley v. Perkins*, 408.

See GRANTS; PUBLIC LANDS, 1.

HOMESTEAD.

1. **EXEMPTIONS—PURCHASE MONEY.**—A debt created by a homestead owner by borrowing money from a third person, without any specific agreement or understanding that such borrowed money is to be used in the purchase of the homestead or the erection of improvements thereon, is not a lien against the homestead, and it is exempt from the payment thereof. *Dreese v. Myers*, 336.
3. **THE HOMESTEAD EXEMPTION ALLOWED TO CHILDREN** by the laws of Alabama terminates when they attain their majority, or cease to be *bona fide* residents of the state. *Coker v. Scroggins*, 52.
See **ADOPTION**, 3; **DEEDS**, 11; **SPECIFIC PERFORMANCE**, 4, 5.

HOTELS.

See **INNKEEPERS**.

HUSBAND AND WIFE.

1. **NO PRESUMPTION OF A GIFT FROM A WIFE TO HER HUSBAND** ARISES from the fact that he deposited in a bank, in his own name, by her permission, her moneys, under circumstances indicating that they were deposited in this manner for convenience, until they could be invested for her benefit, or for that of her husband. *Springfield Institution v. Copeland*, 489.
2. **IF MONEYS ARE DEPOSITED IN A BANK IN THE NAME OF HUSBAND AND WIFE**, subject to withdrawal by either, they belong to her on the death of her husband leaving her surviving. *Springfield Institution v. Copeland*, 489.
3. **IF PERMANENT SECURITIES PURCHASED WITH THE MONEYS** of a wife are placed in the name of her husband with her assent, she will be presumed to have intended them to be his property; but shares of stock so purchased, and marked on the back with her initials, are presumed to belong to her estate. *Springfield Institution v. Copeland*, 489.
4. **WIFE'S RIGHT TO RECOVER MONEY LOANED TO HUSBAND.**—A wife who has made a *bona fide* loan of her money to her husband shortly before his failure in business, is entitled to the same protection out of his assets as are his other creditors. *Mayers v. Kaiser*, 849.
5. **FRAUDULENT CONVEYANCES—EMPLOYMENT OF HUSBAND BY WIFE.**—A wife has a right to employ her husband as her agent to assist her in managing her separate property or business without subjecting it to the claims of his creditors, and the fact that he devotes his time, labor, and skill to the management of such business for a fixed compensation paid by her does not subject the profits of the business or the property accumulated thereby to the claims of his creditors. *Mayers v. Kaiser*, 849.
6. **RESULTING TRUST—LACHES.**—A wife whose husband purchases land with her money and takes the title in his name without her knowledge or consent, and who resides on the land with him, occupying it as their homestead until his death some twenty years after she knows that the title was taken in his name, but without his ever asserting any hostile right in the land, and with his constantly admitting her equitable right thereto, is not guilty of laches so as to defeat her action brought against her husband's heirs soon after his death to enforce a resulting trust in her favor in such land. *Fawcett v. Fawcett*, 844.
7. **MARRIED WOMAN'S DEED—ACKNOWLEDGMENT—RIGHTS OF CREDITORS.**—A married woman's deed executed and delivered in good faith and for a

fair consideration at the time she receives the purchase money, but not acknowledged until several months thereafter, is valid as against her creditors who in the mean time have recovered judgment against her, and they acquire no lien upon the land conveyed, and cannot allege her marital disability to defeat the deed. *Meade v. Clarke*, 669.

8. **MARRIED WOMAN'S DEED—AVOIDANCE OF.**—A married woman's deed to her land can be avoided on the ground of her marital disability by herself alone. *Meade v. Clarke*, 669.
 9. **MARRIED WOMAN'S CONTRACT.**—A note given by a married woman in payment for material used in the construction of a building on her separate estate, cannot be avoided by her under the plea of her disability as a married woman to make such contract. And it makes no difference that she signed the note under a threat from the payee that he would file a mechanic's lien. *Ferguson v. Harris*, 731.
 10. **MARRIED WOMAN'S CONTRACTS—RATIFICATION OF UNAUTHORIZED ACT.** A married woman by adopting the unauthorized act of a third person in obtaining, and having charged to her account, materials used for the benefit of her separate estate, is bound by her subsequent express promise to pay therefor. *Ferguson v. Harris*, 731.
- See DURESS; INSURANCE, 24; LIMITATIONS OF ACTIONS, 4; MARRIAGE AND DIVORCE; SUBROGATION; TRUSTS, 1; WASTE.

ICE.

See MUNICIPAL CORPORATIONS, 10, 11.

IMPEACHMENT.

See ESTOPPEL, 1; JUDGMENTS, 19.

IMPRISONMENT.

See HABEAS CORPUS; PARDONS.

IMPROVEMENTS.

See HOMESTEAD, 1; PARTITION, 8.

INDICTMENT.

CRIMINAL LAW.—DUPPLICITY IN A CRIMINAL PLEADING is the joinder of two or more distinct and separate offenses in one count. *State v. Warren*, 401

See BURGLARY; LARCENY.

INFANTS.

1. **JUDGMENTS AGAINST INFANTS—COLLATERAL ATTACK.**—A judgment taken against an infant served with process and represented by attorney, though without the appointment of a guardian *ad litem*, is valid, and not subject to collateral attack. *Cohoe v. Baer*, 270.
2. **JUDGMENTS AGAINST INFANTS** erroneous, but not void, are not subject to collateral attack. *Cohoe v. Baer*, 270.
3. **JUDGMENTS AGAINST INFANTS—CONCLUSIVENESS OF—COLLATERAL ATTACK.**—The failure of a minor to interpose the plea of infancy in an action against him constitutes a waiver of such plea, and the judgment is as binding upon him as if he had been of full age at the date of its rendition, nor is such judgment subject to collateral attack predicated upon matter *dehors* the record. *Cohoe v. Baer*, 270.

- 4. JUDGMENTS AGAINST INFANTS—COLLATERAL ATTACK.**—If the invalidity of a judgment against an infant is sought to be shown by bringing forward matter extraneous to the record this is a collateral attack, and cannot be made by a party to the judgment. *Cohoe v. Baer*, 270.

See **ADOPTION; DOMICILE, 2-4; HOMESTEADS, 2.**

INJUNCTION.

- OBSTRUCTIONS IN STREETS.**—A mandatory injunction may issue at the suit of a city to compel a lot owner therein to remove his buildings which encroach upon or obstruct a public street. *Blau Claire v. Matzke*, 900.

See **MUNICIPAL CORPORATIONS, 19.**

INNKEEPERS.

- 1. DUTY TO GUESTS.**—A hotel guest who is annoying to other guests or the proprietor, by reason of his intoxication, may be rightfully ejected without unnecessary force or violence; but, if the disturbances caused by him are due to his sickness, he must be treated with the consideration due a sick man, and, if removed from the hotel, must be removed with the consideration due to his condition. *McHugh v. Schlosser*, 699.
- 2. REMOVAL OF SICK GUEST—DAMAGES.**—In an action to recover damages for the death of a guest wrongfully removed from his hotel during his sickness, the question to be considered by the jury is not whether the exposure would surely cause death, but what consequences it was reasonable to suppose might follow such a sudden exposure of the guest in the condition in which he then was. *McHugh v. Schlosser*, 699.

INSANITY.

See **TRIAL, 2, 3.**

INSOLVENCY.

See **SETOFF, 5.**

INSTRUCTIONS.

See **APPEAL, 3-5; TRIAL 4.**

INSURANCE.

- 1. AGENT—WHAT CONSTITUTES.**—An insurer, who delivers a policy to an insurance broker on the understanding that he is to deliver it to the insured, collect the premium, retain his percentage, and remit the balance to the insurer, makes the broker his agent in fact for that transaction, and the receipt of the premium by such agent is the receipt by the insurer. *Arthurholt v. Susquehanna etc. Ins. Co.*, 659
- 2. AGENCY, WHAT CONSTITUTES, AND LIABILITY THEREFOR.**—An insurance company by issuing its policy on an application taken by a party who requested the insured to insure, fixed the amount of premium, made inquiries relative to the property, delivered the policy, and received a commission for his services, makes him its agent, as to that policy, even if he was not so before, and it is estopped from disowning such agency in case of loss. *Kansas etc. Ins. Co. v. Saindon*, 356.
- 3. LIABILITY OF COMPANY FOR FALSE ANSWERS OF AGENT.**—If the the agent of an insurance company makes, or fills in, false answers in an

- application for insurance, without the knowledge or consent of the insured, the company cannot avoid payment of a loss on account thereof. *Kansas etc. Ins. Co. v. Saindon*, 356.
4. UNDER A CONDITION THAT AN INSURANCE SHALL BECOME VOID UPON THE ENTRY OF A DECREE OF FORECLOSURE, or upon a sale under a deed of trust, or if any change takes place in the title or possession of the property, a sale under a power contained in a mortgage, but without any decree or other judicial proceeding directing it, does not avoid the insurance if, by the law of the state, such sale must be reported to a court of equity and there confirmed before it becomes final. The sale contemplated by the policy is a consummated transaction, by which the interest of the assured is divested. *Hanover etc. Ins. Co. v. Brown*, 386.
 5. THE EFFECT OF AN ASSIGNMENT of a policy of insurance when the insurer consents to it, is that a new contract arises between the insurer and the assignee, having all the terms and conditions of the policy, the assignee being substituted in place of the parties originally insured, and becoming the owner of the property at least to the extent of his interest in the property insured. *Hanover etc. Ins. Co. v. Brown*, 386.
 6. ASSIGNMENT OF A POLICY OF INSURANCE RESULTS FROM an indorsement thereon of "loss, if any, payable to Alexander Brown and Sons, as interest may appear," and if they are mortgagees of the property insured, they are entitled to recover for a loss, not exceeding the amount of their debt. *Hanover etc. Ins. Co. v. Brown*, 386.
 7. CONDITION AGAINST ENCUMBRANCES—RENEWAL OF MORTGAGE.—The renewal of mortgages existing on property at the time it is insured does not vitiate the policy nor cause a breach of its condition against future encumbrances during the term of the policy and before loss without notice to, and the consent of, the company. *Kansas etc. Ins. Co. v. Saindon*, 356.
 8. LOSS PAYABLE TO MORTGAGEE—ASSIGNMENT—PARTIES.—A provision in an insurance policy that the loss shall be payable to a mortgagee or his assign, as his interest may appear, operates only as a conditional appointment to pay so much of the proceeds of the policy as may be equal to the amount of the mortgage at the time of a loss under the policy. Such provision does not amount to an assignment of the policy, so that in case of loss the mortgagee alone may sue and recover for it. The right of action is still in the mortgagor. *Williamson v. Michigan etc. Ins. Co.*, 906.
 9. SUBSEQUENT MORTGAGE AND DEED.—The condition that a policy of insurance shall become void if the risk is increased by any means whatever within the control of the assured is not broken by his making a conveyance which is intended and accepted as a mortgage to secure the payment of a loan, unless it is found that the execution of such mortgage did increase such risk. *Crittenden v. Springfield etc. Ins. Co.*, 321.
 10. LOSS PAYABLE TO MORTGAGEE—PARTIES.—A provision in a policy of insurance that the loss shall be payable to a mortgagee or his assign, as his interest may appear, does not operate as an assignment of the policy, whether the mortgage debt is greater or less than the insurance, and an action for a loss under the policy must be brought in the name of the insured, although the mortgagee or his assign, in respect

to his interest, may be joined with the mortgagor as coplaintiff. *Williamson v. Michigan etc. Ins. Co.*, 906.

11. **THE PROOFS OF LOSS DO NOT LIMIT THE AMOUNT WHICH MAY BE RECOVERED** if they were for too small a sum, and the agent of the insurer prepared such proofs, and there was no fraud or concealment, nor any attempt at fraud or concealment on the part of the assured. *Crittenden v. Springfield etc. Ins. Co.*, 321.
12. **NOTICE OF NONPAYMENT OF PREMIUM NOTE.**—Under the laws of Iowa, a notice of the nonpayment of premium will not terminate the liability of the insurer, unless it states "that, unless payment is made within thirty days, the policy will be suspended." A notice that the sum unpaid must reach the office not later than the date thereof does not comply with this statute. *Marden v. Hotel Owners' Ins. Co.*, 316.
13. **FORFEITURE FOR NONPAYMENT OF PREMIUM NOTE IS INCONSISTENT** with a subsequent demand for the payment of such note and a notice that if not paid suit will be brought thereon. *Marden v. Hotel Owners' Ins. Co.*, 316.
14. **WAIVER OF FORFEITURE.**—When a party insured against fire obtains additional insurance without the written consent of the insurer, as provided by the policy, and then notifies the special agents of the latter of the fact, and they, after notifying the insurer, are directed by him to cancel the policy, which they fail to do until after the loss, the insurer is estopped from claiming the enforcement of the strict letter of the policy, and from setting up a forfeiture thereof. *Agricultural Ins. Co. v. Potts*, 637.
15. **WAIVER OF FORFEITURE.**—Any course of action on the part of an insurer which leads an insured honestly to believe that, by conforming thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, estops the insurer from insisting upon a forfeiture though it might be claimed under the express letter of the contract. *Agricultural Ins. Co. v. Potts*, 637.
16. **IT IS NOT NECESSARY FOR THE PLAINTIFF TO PLEAD A WAIVER BY THE INSURER** of a breach of a condition against the property being subject to mortgage if the defense is that the existence of such mortgage was concealed, and, as a matter of fact, it was not concealed, but was made known to the agent who took the application for the insurance. The mortgage and the failure to notify the insurer thereof constitute an affirmative defense, and no pleading is necessary respecting it on the part of the plaintiff. *Crittenden v. Springfield etc. Ins. Co.*, 321.
17. **WAIVER OF CONDITION.**—A provision in a policy of insurance stipulating that the policy shall be void unless payment of the premium shall be made to the secretary, or an agent of the insurer duly appointed as such in writing, is intended to protect the insurer against default on the part of mere solicitors for insurance from the insured, but not to make the latter answerable for the default of the insurer's agents; and if the insurer, either expressly or by acts warranting the implication, in fact appoints an agent to deliver a policy and collect the premium, the receipt of the money by such agent is the receipt by the insurer, and operates as a waiver of such condition in the policy, although the insurer does not in fact receive the premium. *Arthurholt v. Susquehanna etc. Ins. Co.*, 659.

18. **WAIVER OF CONDITION.**—A clause in a policy of insurance providing that the policy shall be void unless the premium is paid to the secretary, or an agent of the insurer duly appointed as such in writing, is waived by the insurer whenever, by his voluntary act, the policy leaves his office to be delivered to the insured on payment of the premium, without regard to the fact that some one, having no nominal connection with the insurer as agent, hands over the policy, receives the premium, and fails to pay it to the insurer. *Arthurholt v. Susquehanna etc. Ins. Co.*, 659.
19. **MISDESCRIPTION OF PREMISES.**—The fact that a policy of insurance on a dwelling-house misdescribes the land on which the dwelling is situated does not affect the risk nor render the policy void. *Kansas etc. Ins. Co. v. Saindon*, 356.
20. **RIGHT TO SUBROGATION.**—THE PAYMENT BY ONE INSURER of more than his share of a loss, and his assignment of his right to contribution, cannot create any cause of action in favor of his assignee if each of the insurers agreed to pay only such proportion of the loss as the amount of insurance assumed by him bore to the whole amount for which insurance had been effected, because, in paying more than his share of the loss, the insurer was a mere volunteer. *Hanover etc. Ins. Co. v. Brown*, 386.
21. **CONTRIBUTION BETWEEN INSURERS.**—If each of several insurers contracts to pay such proportion of the loss to result from the destruction of the insured premises as the amount insured by him bears to the whole insurance effected on the property, neither has any right to contribution from the other, nor will the payment of the whole loss by either of them discharge the liability of the other. *Hanover etc. Ins. Co. v. Brown*, 386.
22. **MISTAKE OF LAW.**—THE FAILURE TO STATE IN A WRITTEN APPLICATION FOR INSURANCE THAT CERTAIN SHELVEING INCLUDED IN THE INSURANCE WAS SUBJECT TO A MORTGAGE cannot avoid the insurance if the agent taking the application was fully informed of all the facts, and the omission to refer to the mortgage in the application was due to the belief of the agent and of the applicant that the shelving was personal property, and therefore not covered by the real estate mortgage. *Crittenden v. Springfield etc. Ins. Co.*, 321.
23. **CONFLICT OF LAWS.**—If an insurance corporation organized and doing business in this state solicits insurance in another, and there receives an application and a premium note which is dated at its home office in this state, to which the note and the application are sent, and from which a policy issues, the contract is deemed to be made here, and is controlled by the laws of this state, and not by the laws of the state in which the property insured is situate. *Marden v. Hotel Owners' Ins. Co.*, 216.
24. **MONEY PAID FOR VOID, ACTION TO RECOVER.**—If a wife procures insurance upon the life of her husband without his knowledge, but at the suggestion of an agent of the insurer, by signing the husband's name to an application, and to the examination form on the back thereof, and subsequently pays the premiums on such insurance for several years, and, on being informed that, under the rules of the company and the conditions of the policy, it is void, because of want of such consent, and thereupon she demands the repayment to her of the moneys so paid, her right to maintain an action therefor depends upon

whether or not she was innocent of any fraudulent design against the company, and was deceived and misled by its agent, who caused her to obtain the insurance in the manner employed by her, and told her that it would be valid though so obtained. *Fisher v. Metropolitan etc. Ins. Co.*, 495.

25. **LIMITATION OF ACTION ON POLICY.**—A provision in an insurance policy that no action shall be sustained to recover a claim thereunder "unless commenced within twelve months next after the fire," limits the time within which such action may be commenced to twelve months from the date of the fire, and not from the time when liability is fixed and a right of action accrues to the insured. *Hart v. Citizens' Ins. Co.*, 877.
26. **APPLICATION OF STATUTE.**—A provision in an insurance policy that no action shall be sustained thereon "unless commenced within twelve months next after the fire," is not affected by a statute providing that no insurance policy shall contain a provision that no action shall be brought thereon. *Hart v. Citizens' Ins. Co.*, 877.
27. **BENEFICIAL ASSOCIATIONS.**—THE DESIGNATION AS A BENEFICIARY OF ONE NOT COMPETENT to be such does not destroy a contract by which a beneficial association agrees to pay a certain sum to such improper beneficiary, and in the event of her death before that of the member upon whose life the beneficial certificate has been issued, that payment shall be made to his heirs. An action, therefore, may be maintained by his administrator for the benefit of his heirs at law. *Shea v. Massachusetts Benefit Assn.*, 475.
28. **A BENEFICIAL ASSOCIATION RECEIVING AND RETAINING MONEY OFFERED IN PAYMENT OF AN ASSESSMENT** thereby waives any objection growing out of delay in such payment. It cannot retain the money on some condition created by its officers or agents, and not communicated to the payor, and then upon his subsequent death escape liability because of such condition, and the noncompliance therewith. *Shea v. Massachusetts Benefit Assn.*, 475.
29. **BENEFICIAL ASSOCIATIONS.**—AN ESTOPPEL TO DENY THE VALIDITY OF A MORTUARY ASSESSMENT does not arise from its payment, unless the association accepts such payment without question. If it chooses to deny that the payment was valid and effectual, the party making it may, on his part, deny that it was due, and impose on the association the burden of proving the validity of the assessment. *Shea v. Massachusetts Benefit Assn.*, 475.
30. **BENEFICIAL ASSOCIATIONS MUST ASSUME THE BURDEN OF PROVING** that a mortuary assessment, for nonpayment of which it seeks to avoid its liability, was duly authorized, and that proper notice thereof was given. *Shea v. Massachusetts Benefit Assn.*, 475.
31. **BENEFICIAL ASSOCIATIONS.**—THE FACT THAT A BENEFICIAL CERTIFICATE WAS ISSUED PAYABLE on the death of A. B. for the benefit of his daughter-in-law, and that all the premiums were paid by her, she not being within the class of persons who may be beneficiaries, does not prove that the contract was void as a wagering contract, if the other evidence tends to show that the certificate was obtained in good faith, and not for the purpose of speculating on the hazard of a life in which she had no legal interest. *Shea v. Massachusetts Benefit Assn.*, 475.
32. **BENEFICIAL ASSOCIATIONS.**—NOTICE OF A CONDITION imposed on receiving moneys tendered in payment of a mortuary assessment is not sufficient

to avoid such payment, unless notice is actually brought home to the payor, and that it was so brought home is not necessarily inferable from the fact that it was mailed to his address. *Shea v. Massachusetts Benefit Assn.*, 475.

33. INSURANCE AGAINST ACCIDENT WHICH IT IS STIPULATED SHALL NOT COVER INJURIES, OF WHICH THERE IS NO VISIBLE EXTERNAL MARK upon the body of the assured, covers an accident of which there was no visible mark at the time of the injury, if there was such a mark afterwards and as a result of such injury. *Pennington v. Pacific etc. Ins. Co.*, 305.
34. INSURANCE AGAINST ACCIDENT—TOTAL LOSS OF BUSINESS TIME, WHAT IS.—If a policy provides that if an accidental injury creates a disability the assured shall be paid a certain sum per week for the immediate, continuous, and total loss of such business time as may result from such injury, he is entitled to recover if his injury is such that he loses his time in the business in which he was engaged when insured, though there are other business pursuits from which the accident would not incapacitate him. *Pennington v. Pacific etc. Ins. Co.*, 306.
35. INSURANCE AGAINST ACCIDENT.—NOTICE AND PROOFS OF LOSS ARE NOT REQUIRED TO BE GIVEN OR MADE AT THE HOME OFFICE of the insurer, when the policy declares any claim thereunder is payable at the company's office, in San Francisco, California, or (at the option of the company) at the general agency through which the policy is issued, and the plaintiff had transacted all his part of the business with a general agent of the insurer at Chicago, Illinois, and had, at the instance of such insurer, been examined by a physician designated by such agent. *Pennington v. Pacific etc. Ins. Co.* 306.

INTEREST.

INTEREST WILL NOT BE ALLOWED ON MONEYS PAID BY MISTAKE and without fraud or knowledge of such mistake, unless there is an express promise to pay such interest, or unless demand has been made for the repayment of the moneys received by mistake, and then only from the date of such demand. *Gould v. Emerson*, 501.

See NEGOTIABLE INSTRUMENTS, 7; TAXES, 1.

INTERSTATE COMMERCE.

1. SALES WITHIN THE STATE.—When both parties to a sale of goods reside in the same state, the sale is not a transaction of interstate commerce. *National Distilling Co. v. Cream City Importing Co.*, 902.
2. TAXATION OF.—No state has a right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on. *Osborne v. State*, 99.
3. A state cannot tax nor regulate interstate commerce, nor make the payment of a tax, or the taking out of a license a condition precedent to carrying on interstate or foreign commerce. *Osborne v. State*, 99.
4. TAXATION OF DOMESTIC BUSINESS.—The doing of business constituting interstate commerce by one who is also engaged in similar business that constitutes local or state commerce, cannot exempt his local or state commerce from taxation or regulation by the state. *Osborne v. State*, 99.

5. **INTERSTATE COMMERCE—TAXATION OF DOMESTIC COMMERCE.**—An express company which confines its business to interstate or foreign commerce is exempt from state taxation or regulation, but if it combines and carries on a local and state business, together with its interstate business, it is subject to state taxation and regulation so far as its local and state business is involved. *Osborne v. State*, 99.
6. **TAXATION OF DOMESTIC BUSINESS—CONSTITUTIONALITY OF STATUTE.**—A state statute providing that no person shall engage in or manage any business named therein without taking out a state license and paying an occupation tax and license fee, and authorizing counties and municipalities to impose additional taxes, and providing a penalty for a violation of its provisions, does not attempt to tax or regulate interstate commerce as distinguished from local or state commerce, and applies only to the latter. Such statute is valid when applied to the local or state business of an express company engaged in both a state and interstate business or commerce, so long as it has a uniform operation throughout the state as to such business, and is not shown to be prohibitory or destructive thereof. *Osborne v. State*, 99.
7. **TAXATION OF DOMESTIC BUSINESS.**—A state statute imposing a general tax on certain kinds of business or occupations, and requiring a license to be taken out before such business or occupation shall be engaged in, must be construed as not applying to such business as may constitute interstate or foreign commerce, but only to such business of the kinds specified as constitutes local or state commerce, and to persons engaged or intending to engage therein. *Osborne v. State*, 99.

INTOXICATING LIQUORS.

See DEEDS, 9, 10.

ISLANDS.

See ACCRETIONS.

JOINDER.

See INDICTMENT.

JUDGES.

- A **JUDICIAL OFFICER CANNOT BE CALLED TO ACCOUNT IN A CIVIL ACTION** for his determination of acts in his judicial capacity. *Stewart v. Case*, 575.

See PROHIBITION, 2.

JUDGMENTS.

1. **APPELLATE PROCEDURE.**—A JUDGMENT IS FINAL so as to permit an appeal therefrom, though the costs have not been taxed or allowed. The taxation of costs may take place after the entry of a judgment, and therefore the fact that they have not been taxed does not prove that no final judgment has been entered. *Williams v. Wait*, 768.
2. A JUDGMENT IS NOT FINAL UNLESS it is complete and definitive in its nature, and a valid and subsisting obligation. It must be certain, or capable of being made so. *Dow v. Blake*, 156.
3. A JUDGMENT IS FINAL THOUGH THE DEFENDANT IS GIVEN LEAVE TO APPLY TO THE TRIAL COURT for a modification of it as to the time of its payment. *Dow v. Blake*, 156.

4. **A JUDGMENT IS FINAL IF NO FURTHER QUESTIONS CAN COME BEFORE THE COURT EXCEPT** such as are necessary to be determined in carrying it into effect. *Dow v. Blake*, 156.
5. **A JUDGMENT IS FINAL WHEN IT ALLOWS A GROSS SUM TO A WIFE** in a divorce suit, as a final distribution of the husband's estate between the parties. *Dow v. Blake*, 156.
6. **APPEAL—ESTOPPEL.**—A mere appeal does not affect a judgment as a bar to another action. *Smith v. Schreiner*, 869.
7. **A JUDGMENT RENDERED IN ANOTHER STATE, IF SUED UPON HERE,** must be given the same force and effect as it is entitled to in the state wherein it is entered. *Dow v. Blake*, 156.
8. **AN APPEAL FROM A JUDGMENT RENDERED IN ANOTHER STATE DOES NOT** suspend the effect of the judgment in an action thereon in this state, unless such appeal has that effect in the state in which the judgment was entered. *Dow v. Blake*, 156.
9. **A JUDGMENT IS PROPERLY DECLARED UPON AS A JUDGMENT OF THE COURT IN WHICH IT WAS ENTERED,** though it was afterwards appealed from and affirmed in the appellate court. *Dow v. Blake*, 156.
10. **ESTOPPEL.**—If, in an action to recover personal property levied upon under execution, the transfer of the plaintiff is attacked as being made to defraud creditors, and after a trial on the merits is adjudged not to be fraudulent nor void, its validity cannot be assailed in a subsequent equitable suit to subject to execution real property included in the same transfer. It is not essential that the title to the property should be expressly involved in the former action. It is sufficient that the main question presented in the first action is necessarily involved in the second. *Baxter v. Myers*, 298.
11. **ESTOPPEL.**—THE MOST INFALIBLE TEST as to whether a former judgment is a bar is to inquire whether the same evidence will maintain both the present and the former action. *Hodge v. Shaw*, 290.
12. **ESTOPPEL.**—IF THE PARTIES ARE THE SAME the legal effect of a former judgment is not impaired because the subject matter of the second action is different, provided the former suit involved the same title and depended upon the same question. *Hodge v. Shaw*, 290.
13. **FORMER RECOVERY.**—A JUDGMENT IN FAVOR OF PLAINTIFF FOR A SUM OF MONEY in a suit in which he claims damages for the obstruction of a right of way granted him by the defendant, and asks that defendant be required to furnish him another right of way to the same premises, is a full and complete recovery, and plaintiff cannot maintain any further action either to recover for the continued obstruction of the old right of way or for the failure to furnish him another right of way in place of that so obstructed. *Hodge v. Shaw*, 290.
14. **THE FACT THAT THE PLAINTIFF IS GIVEN BUT A PART OF THE RELIEF** which he seeks in an action is an adjudication that he is not entitled to any other. *Hodge v. Shaw*, 290.
15. **PARTIES BOUND BY.**—A PLAINTIFF WHO DIRECTS THE LEVY OF A WRIT AND ASSUMES THE MANAGEMENT OF THE DEFENSE of the sheriff, when sued for such levy, is bound by the judgment, and estopped from further contesting any issue necessarily litigated and determined thereby. *Baxter v. Myers*, 298.
16. **JUDGMENT IN ACTION ON ACCOUNT.**—In an action upon an account, and upon a note given for part thereof, and the note is in court, the defendants are not prejudiced by the fact that the findings and judgment rest

upon the account rather than upon the note, especially when no interest is allowed. *Spaulding v. Stubbings*, 888.

17. PRACTICE.—A VARIANCE BETWEEN A JUDGMENT AS DESCRIBED in the declaration and the judgment as proved is waived if not objected to when it is offered in evidence. *Dow v. Blake*, 156.
18. AMENDMENT OF.—A court cannot correct a judgment as in fact rendered after the term has passed. The power to amend or change the judgment is then confined to the court having appellate jurisdiction. *In re Black*, 331.
19. A JUDGMENT CANNOT BE IMPEACHED for fraud by a party or privy to it, and in which such party participated. *Dow v. Blake*, 156.
20. A JUDGMENT MUST BE FINAL BEFORE AN ACTION UPON IT can be sustained. *Dow v. Blake*, 156.
21. A JUDGMENT MAY BE ENFORCED BY AN ACTION, THOUGH a petition has been filed in the trial court to reduce the amount thereof. *Dow v. Blake*, 156.
22. AN ACTION LIES ON A FINAL DECREE FOR ALIMONY, though rendered in another state. *Dow v. Blake*, 156.
23. IN AN ACTION ON A DECREE OF A COURT OF ANOTHER STATE THE DEFENSE that it was a decree of divorce obtained by collusion between the parties cannot be entertained. Neither the defendant nor his personal representative can attack the decree because of fraud in which the defendant participated. *Dow v. Blake*, 156.
24. JUDGMENT LIENS—REVIVAL—RIGHTS OF PURCHASER.—The lien of a judgment revived within the time allowed by statute, after its expiration by limitation, cannot relate back so as to defeat the title of a *bona fide* purchaser of the debtor's property between the date when the original judgment lien expired by limitation and the revival thereof. *Woodward v. Woodward*, 716.
25. JUDGMENT LIENS—REVIVAL—RIGHTS OF INTERMEDIATE PURCHASERS.—The revival of a judgment and of its lien which has expired by limitation is subject to the rights of *bona fide* purchasers or encumbrancers without notice acquired during the suspension of such lien. *Woodward v. Woodward*, 716.

See CREDITOR'S SUIT, 3, 4; INFANTS, 1-4; MERGER, 1.

JURISDICTION.

1. THE JURISDICTION OF AN APPELLATE COURT OF ANOTHER STATE which has rendered a judgment upon appeal affirming an order of a subordinate court, must be presumed. *Van Matre v. Sankey*, 196.
2. THE JURISDICTION OF A COURT TO ORDER THE ADOPTION OF A MINOR CHILD is necessarily before the court in subsequent proceedings to vacate such order, and the denial of the vacation conclusively affirms such jurisdiction. *Van Matre v. Sankey*, 196.
3. VOID JUDGMENTS—LAPSED TERM OF COURT.—A person tried and convicted of crime at a lapsed term of court, and at a time when the court cannot legally be held, is tried when the court is without jurisdiction, and the judgment of conviction is void. *In re Terrill*, 327.

See ADOPTION, 8; EXECUTION, 5; PARTITION, 4-6; PLEADING, 6; PROHIBITION.

JURY AND JURORS.

See TRIAL.

LABOR UNIONS.

1. **LIABILITY OF.—A NOTICE FROM A LABOR UNION** to a firm of clothiers that if the non-union man in their employ is any longer retained, all labor organizations in the city will be notified that the house is a non-union one, and asking that the matter be given due consideration, must contemplate that such non-union man will be discharged from his employment, and therefor renders the union answerable for damages resulting from his discharge by his employers as a consequence of such notice. *Lucke v. Clothing Cutters' etc. Assembly*, 421.
2. **A LABOR UNION PROCURING THE DISCHARGE OF A PERSON** from his employment because he is a non-union man acts wrongfully, and is liable for the consequent injury to him. *Lucke v. Clothing Cutters' etc. Assembly*, 421.
3. **LABOR AND TRADES UNIONS, POWERS OF.—A statute** authorizing the formation of labor unions "to promote the well-being of their every-day life, and for mutual assistance in securing the most favorable conditions for the labor of their members and as beneficial societies" does not authorize the promotion of such objects by making war upon non-union laboring men, or by illegal interference with their rights and privileges. *Lucke v. Clothing Cutters' etc. Assembly*, 421.

See EVIDENCE.

LACHES.

See HUSBAND AND WIFE, 6.

LANDLORD AND TENANT.

1. **EVIDENCE.—FOR THE PURPOSE OF PROVING** the landlord's title in an action between him and his tenant, a lease from the former to the latter is competent and sufficient evidence. *Williams v. Wirt*, 768.
2. **ESTOPPEL.—A TENANT CANNOT DISPUTE THE LANDLORD'S TITLE** in an action to recover possession of the leased premises, though he did not receive such possession from his landlord, by evidence tending to prove that while he was himself the owner and in possession of the property, he and his wife were by fraud and duress induced to execute a conveyance thereof to the plaintiff, after which he accepted a lease from the plaintiff. *Williams v. Wirt*, 768.
3. **A TENANT IS ESTOPPED FROM CONTROVERTING HIS LANDLORD'S TITLE** WHILE REMAINING IN POSSESSION of the leased premises, though he receives such possession from the landlord, unless he can prove that the lease was obtained by fraud, misrepresentation, or mistake, and the fact that the tenant had before the lease a better title than his landlord does not create a presumption of such fraud, or that the lease was accepted by mistake. *Williams v. Wirt*, 768.
4. **A LANDLORD, WHILE HIS TENANT IS IN POSSESSION, MAY SUSTAIN AN ACTION** IN CASE for injury to the freehold. *Arneson v. Spawen*, 763.
5. **ACTIONABLE INJURY TO THE REVERSION.—The constructing of a permanent fence across a part of his land, and thus including it within, and attaching it to, the defendant's farm, under a claim of ownership by the latter, is an injury to the freehold for which a landlord may maintain an action, though committed when the premises were in possession of a tenant under a lease.** *Arneson v. Spawen*, 763.

6. **AN INJURY TO THE REVERSION FOR WHICH A LANDLORD MAY RECOVER** by action will be presumed from an act which, if persisted in, may ripen into an adverse right. *Arneson v. Spawn*, 783.

See PLEADING, 10.

LARCENY.

CRIMINAL LAW—INDICTMENT.—THE STEALING AT THE SAME TIME of several articles belonging to several owners constitutes but one crime, and may, therefore, be charged in a single count of the same indictment, without making it objectionable for duplicity. *State v. Warren*, 401.

LEASE.

See LANDLORD AND TENANT.

LEGISLATURE.

EMINENT DOMAIN.—NECESSITY FOR TAKING LANDS FOR PUBLIC USE by right of eminent domain is one to be determined by the legislative department of the government, but it may delegate the exercise of such legislative authority to town or municipal officers. *Wisconsin Water Co. v. Winans*, 813.

See EMINENT DOMAIN, 1, 2; HIGHWAYS, 1; MUNICIPAL CORPORATIONS, 4.

LETTERS.

See EVIDENCE, 10; RAILROADS, 8.

LIBEL.

1. **WRITTEN SLANDER UPON BUSINESS.**—A letter written by one of two dealers advising a shipper to look out for the other dealer "that you are shipping milk or cream to, unless you have surety for your goods, as he does not pay any of his shippers any thing, and he sells the milk and cream for about what it costs him, and the shippers are the losers," tends directly to prejudice such dealer in his trade and business, and is libelous *per se*. *Brown v. Vannaman*, 860.
2. **PRIVILEGED COMMUNICATION—WRITTEN SLANDER UPON BUSINESS.**—A letter voluntarily written by one of two rival dealers acting from motives of personal gain to be secured through the injury of his rival, warning a shipper against sending goods to such rival, as he does not pay for them, is not a privileged communication, and a mere belief in the truth of the statements contained therein, without good cause for such belief, is no defense to an action for libel. *Brown v. Vannaman*, 860.
3. **DAMAGES.**—A verdict for damages in an action for libel, though large, is not subject to change on appeal unless it is so excessive as to create the belief that the jury were misled either by passion, prejudice, or ignorance, and that the court abused its discretion in allowing the verdict to stand. *Brown v. Vannaman*, 860.

LICENSE.

See INTERSTATE COMMERCE, 3; REAL PROPERTY.

LIENS.

1. COMMON LAW AND STATUTORY.—Common-law liens as distinguished from contract or statutory liens attach to the property without reference to ownership, and override all other rights in the property, while the latter liens are subordinate to all prior existing rights therein. *Sullivan v. Clifton*, 652.
2. LIEN OF LIVERYMAN.—A chattel mortgage on a horse is superior to a statutory lien of a livery-stable keeper for his board and keeping furnished at the request of the owner after the execution of them ortgage. *Sullivan v. Clifton*, 652.

See JUDGMENTS, 24, 25; MECHANICS' LIENS.

LIMITATIONS OF ACTIONS.

1. FOREIGN CORPORATIONS.—STATUTE OF LIMITATIONS.—A foreign corporation is a person "out of the state," and cannot avail itself of the statute of limitations. *Larson v. Aultman etc.Co.*, 893.
2. TRUSTS.—As long as there is a continuing and subsisting equitable trust acknowledged or acted upon by the parties, the statute of limitations does not apply, but if the trustee denies the right of his *cestui que trust*, and the possession becomes adverse, lapse of time from that period may constitute a bar in equity. Trusts which are the ground of an action at law are not exempted from the operation of the statute. *Fawcett v. Fawcett*, 844.
3. TRUSTS.—STATUTE OF LIMITATIONS does not begin to run against a *cestui que trust* in possession until the date of his ouster, no matter what the nature of the trust may be. *Fawcett v. Fawcett*, 844.
4. HUSBAND AND WIFE.—STATUTE OF LIMITATIONS does not run against claims between husband and wife. *Fawcett v. Fawcett*, 844.
5. WHERE A MISTAKE in paying moneys is to be corrected by a court of equity, the statute of limitations does not begin to run until the time when the mistake is discovered, or, at any rate, until the time when, by the use of due diligence, it ought to have been discovered. *Gould v. Emerson*, 501.
6. NEW PROMISE.—A grantee of a mortgagor who assumes and agrees to pay the mortgage does not, by subsequent payment of part of the principal and interest, toll the statute of limitations as against his grantor, the original mortgagor. *Cottrell v. Shepherd*, 919.

See ADVERSE POSSESSION, 4, 5; COTENANCY, 8; INSURANCE, 25, 26; PARTITION, 9; SETOFF, 6; TRUSTS, 1.

LIVESTOCK.

See RAILROADS, 8-12.

LOANS.

See AGENCY, 1.

MACHINERY.

See FIXTURES, 2; MASTER AND SERVANT, 9-13, 15; SALES, 7-11.

MALICE.

See CONSPIRACY, 6; DAMAGES, 3.

MALICIOUS PROSECUTION.

1. **FOR THE MALICIOUS PROSECUTION OF A CIVIL ACTION** without probable cause an action will lie. *O'Neill v. Johnson*, 615.
2. **IN AN ACTION FOR MALICIOUS PROSECUTION MALICE IS A FACT TO BE PLEADED** as such, and it would be bad pleading to set forth the evidence to establish it. *O'Neill v. Johnson*, 615.
3. **PLEADING.**—A COMPLAINT AVERRING that the defendant instituted a civil action against plaintiff maliciously and without probable cause, and that plaintiff was indebted to the defendant in no sum, and liable to her in no manner whatever, which defendant well knew, and that plaintiff necessarily lost time and performed work in defending the action, and employed and was compelled to pay attorneys in such defense, states a cause of action. *O'Neill v. Johnson*, 615.
4. **DAMAGES, REMOTE FOR MALICIOUS PROSECUTION.**—An allegation that by reason of a garnishment in an action of a sum due the defendant therein, which sum was not paid to him, and he was unable to pay his rent and his employees, and his lease was canceled by his landlord, and his employees left his service, and his business was thereby ruined and his prospects blighted, discloses damages too remote for allowance in an action for the malicious prosecution of the former suit. *O'Neill v. Johnson*, 615.

MANCUPATION.

See FISHERIES, 2.

MANDAMUS.

1. **OFFICE AND OFFICERS—MANDAMUS TO OBTAIN POSSESSION—DEFENSE.**—In a *mandamus* proceeding by a person holding *prima facie* title to an office, to enforce his right to immediate possession thereto, the fact that another claimant received a greater number of legal votes at the election is not pleadable as a defense. *State v. Oates*, 912.
2. **OFFICE AND OFFICERS—MANDAMUS TO OBTAIN POSSESSION—DEFENSE.**—A person entitled to immediate possession of an office under his *prima facie* title thereto may enforce his right by *mandamus*, unaffected by the fact that another claiming a right to the office may be able, in *quo warranto* proceedings, to successfully contest such *prima facie* title. *State v. Oates*, 912.
3. **OFFICE AND OFFICERS—MANDAMUS TO OBTAIN POSSESSION.**—One *prima facie* entitled to an office under the authorized canvass of votes and certificate of election may enforce his right to the possession of the office by writ of *mandamus*, as against one who holds the office without color of authority after the expiration of his term, especially when the statutory proceeding to compel the delivery of the books and papers of the office is inadequate. *State v. Oates*, 912.
4. **IMMATERIAL DEFECT.**—Although an alternative writ of *mandamus* is defective in that it is signed by the judge instead of the clerk of the court, and is not under seal, the defect must be regarded as immaterial when no substantial right is affected. *State v. Oates*, 912.

See QUO WARRANTO.

MARRIAGE AND DIVORCE.

1. **RES JUDICATA.**—IF A DEFENSE IS NOT INTERPOSED to an action or proceeding, nor any determination therein made respecting it, the party in

whose favor it exists is not precluded from urging it as a cause of action or of defense in a subsequent proceeding which is independent of the original suit. Hence, if a husband is sued by his wife for separate support and maintenance, and a judgment is entered in her favor on the ground that she is living apart from him for justifiable cause, this does not estop him in a subsequent suit for divorce from proving that prior to the former proceeding she had been guilty of adultery, and ejected from his house for that cause, provided he did not, in the former proceeding, attempt to defend on the ground of such adultery, and it was not brought to the attention of the court either by pleading or evidence. *Watts v. Watts*, 509.

2. **RES JUDICATA.**—A DECREE AFFIRMING THAT A WIFE IS LIVING APART FROM HER HUSBAND FOR JUSTIFIABLE CAUSE does not necessarily affirm that she had not been guilty of adultery, nor preclude him from subsequently maintaining a suit for divorce on the ground of such adultery. *Watts v. Watts*, 509.
3. **RES JUDICATA.**—A DECREE AFFIRMING THAT A WIFE IS LIVING APART FROM HER HUSBAND FOR JUSTIFIABLE CAUSE DOES NOT NECESSARILY AFFIRM that she has a cause entitling her to a divorce, nor that a cause of divorce does not exist in favor of her husband against her. *Watts v. Watts*, 509.
4. **DIVORCE—RES JUDICATA.**—A final decree of divorce settles all property rights of the parties, and bars a subsequent action by either party to determine any question of alimony or property rights which might have been settled by such decree, and a decree on service by publication is as effectual as where personal service is made. *Roe v. Roe*, 367.
5. **DIVORCE—ALIMONY—RES JUDICATA.**—A valid decree of divorce obtained by a husband from his wife in one state, without provision with reference to property or alimony, is a bar to an action brought long afterward by the wife in another state to obtain a judgment of divorce and for alimony, or for alimony alone, in the absence of proof that the law of the former state is different from that of the latter. *Roe v. Roe*, 367.
6. **JUDGMENTS—ORDER FOR IN DIVORCE PROCEEDINGS—RETROACTIVE EFFECT OF.**—An order for judgment in divorce proceedings does not affect the *status* of the parties, nor render them capable of contracting marriage with third persons; and the judgment, when afterwards entered, cannot operate to make an act of sexual intercourse adultery which was not a crime when committed, or if then a crime, to make it one of a higher grade. *State v. Eaton*, 867.

See MERGER, 1; JUDGMENTS, 5, 23.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. If a laundress is being conveyed from her place of residence to her place of work in a vehicle driven by the coachman of her employer, and an accident occurs, she must be regarded as being in the service of her employer at that time, and as assuming the perils incident to that service. *McGuirk v. Shattuck*, 454.
2. **FELLOW-SERVANTS—WHO ARE.**—All persons employed under one principal in the conduct of one enterprise, such as operating a railroad, are

the servants of one master, and therefore fellow-servants of each other. *Jenkins v. Richmond etc. R. R. Co.*, 750.

3. **FELLOW-SERVANTS—HOW DETERMINED.**—Whether parties are fellow-servants is not to be determined by the rank or grade of the offending or injured servant, but is to be determined by the character of the act being performed by the offending servant. If it is an act that the law implies a contract duty on the part of the employer to perform, then the offending employee is not a servant, but an agent; as to all other acts they are fellow-servants. *Jenkins v. Richmond etc. R. R. Co.*, 750.
4. **FELLOW-SERVANTS—RANK AS AFFECTING.**—Whether persons engaged in the same employment are fellow-servants or not does not depend upon their rank, grade, or authority. All who serve the same master, work under the same control, derive authority and compensation from the same source, are engaged in the same general business, though in different grades or departments of it, are fellow-servants who take the risk of each other's negligence. *Jenkins v. Richmond etc. R. R. Co.*, 750.
5. **FELLOW-SERVANTS.—A LAUNDRESS AND A COACHMAN OF HER EMPLOYER** who is in charge of a horse and vehicle in which she is being conveyed from her home to her place of work are fellow-servants, and she, therefore, cannot recover of their common employer for injuries suffered from the negligence of the coachman. *McGuirk v. Shattuck*, 454.
6. **FELLOW-SERVANTS.**—A servant does not assume the risk of the negligence of a fellow-servant in using defective machinery. *Monmouth Mining etc. Co. v. Erling*, 187.
7. **LIABILITY FOR NEGLIGENCE OF FELLOW-SERVANTS.**—A master who uses due diligence in the selection of competent and trusty servants, and furnishes them with suitable means to perform the services in which he employs them, is not answerable to one of them for an injury received in consequence of the carelessness or negligence of another while both are employed in the same service. *Jenkins v. Richmond etc. R. R. Co.*, 750.
8. **A MASTER CANNOT DELEGATE TO A SERVANT THE DUTY OF SEEING THAT MACHINERY** with which other servants must work is reasonably safe, so as to relieve himself from liability for the negligence of the servant to whom such duty is delegated. *Monmouth Mining etc. Co. v. Erling*, 187.
9. **A MASTER IS BOUND TO EXERCISE REASONABLE CARE AND DILIGENCE IN PROVIDING AND KEEPING IN REPAIR SAFE TOOLS AND MACHINERY** for his servant's use. A servant, therefore, has the right to presume such tools and machinery are safe, and will be kept in repair. *Monmouth Mining etc. Co. v. Erling*, 187.
10. **THE DUTY RESIDES IN THE SERVANT TO OBSERVE WHETHER MACHINERY** furnished him is in repair, and to report to the master if it is not. *Monmouth Mining etc. Co. v. Erling*, 187.
11. **IF MACHINERY WITH WHICH SERVANTS WORK IS OUT OF REPAIR** and in a dangerous condition for more than two weeks, the master must be chargeable with negligence if the supervision exercised by him or his agents has been such that he does not know of the condition of such machinery. *Monmouth Mining etc. Co. v. Erling*, 187.
12. **A MASTER IS NOT ANSWERABLE FOR INJURY TO HIS SERVANT RESULTING FROM NOT ADOPTING THE BEST AND SAFEST MACHINERY**, if that which he did employ was reasonably suitable and proper for the business, but an error in admitting evidence upon this subject is made harmless by an instruction to the jury that the defendant was not

- bound to furnish the very best and most improved machinery, nor that which was absolutely safe. *Monmouth Mining etc. Co. v. Erling*, 187.
13. NEGLIGENCE—NECESSARY ALLEGATIONS AND PROOF.—To enable an employee to recover from his employer on account of injuries received by reason of defective places, machinery, appliances, or incompetent co-employees it is generally necessary to allege and prove that the employer was in fault, and that the employee was without fault, or to allege and prove facts from which such fault and want of fault may be inferred. *Pennsylvania Co. v. Congdon*, 251.
14. UNSAFE VEHICLE.—If a vehicle in which a servant is to ride to the place of work is unsafe, by reason of not having a proper seat, and this is obvious, and she, being aware of it, puts in a camp-chair and sits in it, and his mode of riding is not safe, it is her own act rather than the negligence of the employer, and if it leads to injury, she cannot recover. *McQuirk v. Shattuck*, 454.
15. CONTRIBUTORY NEGLIGENCE.—A servant injured by machinery being out of repair, and in a dangerous condition, is not chargeable with contributory negligence if he had no actual notice of the want of repair, and his duties did not require him to be in charge of the machinery, and his labor was only incidental to it. *Monmouth Mining etc. Co. v. Erling*, 187.
16. CONTRACT—PLEADING.—IF ONE IS ENGAGED TO WORK FOR ANOTHER, and would have been retained in that employment as long as his work was satisfactory but for the unlawful interference of a third person by which his discharge is secured, he may sustain an action for the resulting damages. In such action, however, he should allege the true facts concerning his contract of employment, and cannot recover upon an allegation of a contract for a long or specific time. He may be permitted to amend his declaration in accordance with the facts, and thereupon to maintain his action. *Lucke v. Clothing Cutters' etc. Assembly*, 433.
17. WRONGFUL ARREST BY RAILROAD DETECTIVE—RESPONDEAT SUPERIOR. If an employee of a railway company has general authority, actual or apparent, to act for his employer in the capacity of detective officer, and such authority includes, expressly or by general usage and consent, the power to make an arrest in the employer's behalf, the mode of execution of such power, with warrant or without, is immaterial, and the employer is liable for a wrongful arrest. *Duggan v. Baltimore etc. R. R.*, 772.
- See COMPOUNDING FELONY; CONFLICT OF LAWS; CONSPIRACY, 3-5; LABOR UNIONS, 1, 2; RAILROADS, 23-28.

MECHANIC'S LIEN.

1. THAT LABOR IS PERFORMED "BY THE CONSENT OF THE OWNER OF A BUILDING" is not established by proving his knowledge that such labor was being performed, where it does not appear that he knew who was doing the work, nor under what contract, nor that any lien was or might be claimed, and he does not in words express his consent. *Saunders v. Bennett*, 456.
2. OWNER OF PROPERTY, WHO IS.—One in possession of realty under a contract to purchase cannot be regarded as an owner within the meaning of

the statute respecting mechanics' liens. Nor can such a lien be enforced against such person after he has acquired the legal title, unless he has estopped himself from denying that he was the owner at a prior date. *Saunders v. Bennett*, 456.

See MORTGAGES, 4.

MERGER.

1. JUDGMENT—MERGER OF ONE IN ANOTHER.—If a judgment is rendered, divorcing parties, and designating a sum to be paid by the husband to the wife on releasing her claim to dower, and subsequently another judgment is rendered in the same suit, by which the wife recovers a much greater sum, the former judgment merges in the latter so far as it directs the payment of money. *Dow v. Blake*, 156.
2. JUDGMENT—If a person in a railway accident receives an injury to his person and to his clothing, they furnish but one cause of action, and a recovery for either precludes any further recovery for the other. *Bliss v. New York etc. R. R. Co.*, 504.

METES AND BOUNDS.

See DOWER, 1, 2, 4.

MINORS.

See INFANTS.

MISTAKE.

See ADVERSE POSSESSION, 4; COURTS, 2; ELECTIONS, 1; EQUITY, 2; INTEREST; LANDLORD AND TENANT, 3; LIMITATIONS OF ACTIONS, 5.

MONOPOLIES.

1. TRADE COMBINATIONS—CONTRACTS OF SALE WITH—PUBLIC POLICY.—A contract by which a buyer of certain goods is to receive a rebate on their purchase price, on condition that he purchases for a certain time from an illegal trust or combination or members thereof, does not render a sale of such goods invalid as against public policy and in restraint of trade. *National Distilling Co. v. Cream City Importing Co.*, 902.
2. TRADE COMBINATIONS—CONTRACT OF SALE WITH—RECOVERY OF PRICE.—The fact that a person is a member of an illegal trust or combination, formed for the purpose of acquiring control and a monopoly of the trade in certain goods, does not in law prevent him from selling goods within, or affected by, the provisions of such trust, and recovering their price or value when the illegality of the trust is entirely collateral to the sale. *National Distilling Co. v. Cream City Importing Co.*, 902.
3. TRADE COMBINATIONS—CONTRACT OF SALE WITH—ACTION FOR PRICE—PLEA IN ABATEMENT.—In an action by a member of an illegal trust or combination to recover the price of goods sold by him, an allegation that such trust is the real party in interest in the action, and that it can only be maintained by it, is fatally defective as a plea in abatement, without an allegation that such trust is a partnership or corporation and that it, or some of its members other than plaintiff, had an interest in the goods sold or the money to be paid for them, together with a denial of indebtedness to the plaintiff.—*National Distilling Co. v. Cream City Importing Co.*, 902.

MONUMENTS.

See BOUNDARIES, 7, 8, 10; SURVEYS, 2.

MORTGAGE.

1. **ASSUMPTION OF—EVIDENCE.**—To create a personal liability on the part of a grantee in a deed to pay a prior mortgage on the premises conveyed, the covenant or words used must clearly import that the obligation was intended by the grantor, and knowingly assumed by the grantee. The use of the words "except a mortgage of two thousand one hundred and seventy dollars, and one interest mortgage of one hundred and ninety-five dollars, which mortgages of second party accept and agree to pay," in the deed, wholly unexplained by other evidence, are not sufficient to show an assumption of such mortgages by the grantee named in the deed; but his intent to assume their payment may be shown by evidence outside the deed. *Hopper v. Calhoun*, 363.
 2. **ASSIGNMENT—NOTICE OF TO MORTGAGOR—PAYMENTS—ESTOPPEL.**—An assignee of a mortgage to protect himself must give actual notice to the mortgagor, and a marginal record notice of the assignment of a mortgage is not such notice as to prevent the mortgagor from setting up payments by him to the mortgagee made after the assignment and before he has actual notice thereof. *Foster v. Carson*, 696.
 3. **NOTICE OF ASSIGNMENT—PAYMENT.**—Actual notice of the assignment of a mortgage is essential to the completion of the contract relations between the assignee and the mortgagor. Until that has been given the mortgagor does no wrong in making payments to the original mortgagee. *Foster v. Carson*, 696.
 4. **MECHANIC'S LIEN.**—If one in possession of land under an agreement to purchase, contracts for the erection of a building thereon, and while the work is in progress receives a conveyance, and at the same time, and as a part of the same transaction, executes a mortgage, the lien of the mortgage is paramount to any lien existing in favor of a mechanic for labor in erecting the building. *Saunders v. Bennett*, 456.
 5. **MORTGAGES—FORECLOSURE—EVIDENCE.**—In an action to foreclose a mortgage to secure the payment of a composition with creditors a ruling that testimony given by the mortgagor in supplementary proceedings, after the execution of the mortgage, is competent against the plaintiff only to the extent of impeaching the credibility of the mortgagor after a proper foundation has been laid, is not ground for reversal when the mortgagor was a witness, and might have been examined as to all matters covered by such evidence. *Monaghan Bay Co. v. Dickson*, 704.
 6. **A SUIT TO REDEEM** from a mortgage cannot be maintained unless the debt was due when suit was commenced, though it became due subsequently, and before the hearing of the cause. *Bernard v. Toplitz*, 465.
- See ATTORNEY AND CLIENT, 2; CROPS; EQUITY, 1; FIXTURES, 2; FRAUDULENT CONVEYANCES, 1, 2; INSURANCE, 4, 6-10, 16; PARTITION, 2; SUBROGATION.

MUNICIPAL CORPORATIONS.

1. **PROCEEDINGS TO INCORPORATE A TOWN ALREADY INCORPORATED.**—Proceedings before the probate judge for the incorporation of a town are void if it has already been incorporated and its charter has not been forfeited. Nor can these proceedings be sustained on proof that there

- had been no user of the charter for many years, and the incorporators believed such nonuser had forfeited the corporate rights and terminated the corporate existence. *Butler v. Walker*, 61.
2. **CONDITIONS SUBSEQUENT—FORFEITURE OF CHARTER.**—If the charter of a municipality declares that on the failure to hold the annual elections on a day mentioned in such charter all the powers, rights, and privileges conferred on the municipality as a corporation shall forever cease and determine and be in no force and effect whatever this is a sufficient legislative determination and declaration of dissolution, and of itself, on the happening of the condition, works the corporate destruction. *Butler v. Walker*, 61.
 3. **A MUNICIPAL CORPORATION DOES NOT FORFEIT ITS CHARTER BY NON-USER** for any period of time. To work such forfeiture there must be legislative action by a repeal of the act of incorporation or judicial action adjudging the forfeiture, unless the legislature, in its act of incorporation or otherwise, declares that, upon the happening of a certain contingency, the corporation shall cease, and such contingency has taken place. *Butler v. Walker*, 61.
 4. **OFFICERS—REMOVAL—POWER OF COUNCIL.**—When the absolute authority and entire responsibility of the appointment of a city officer for a fixed term are given by law to the mayor without power of removal at will or for cause the common council of the city has no inherent power to remove such officer. Such common council has only such power as it derives from express legislative enactments. *Speed v. Common Council*, 555.
 5. **OFFICERS—REMOVAL.**—The mayor of a city cannot revoke the appointment of a city officer when once made, and neither he nor the common council of the city possesses the power to remove such officer at will. *Speed v. Common Council*, 555.
 6. **THE APPROVAL OF THE MAYOR** is not necessary to a resolution of the common council preferring charges against an officer, where such council, by a vote of two-thirds of its members, is authorized to remove an officer for a sufficient cause after preferring charges and giving him a hearing. *State v. Duluth*, 595.
 7. **MAJORITY VOTE OF MEMBERS, WHAT IS.**—If a statute requires, for the purpose of filling a vacancy in a city council, a majority vote of the remaining members, such vacancy cannot be filled by a majority of those present, unless they also constitute a majority of all the members of the council, both present and absent. *Mayor v. Davis*, 94.
 8. **AMENDMENT OF THE RECORDS** of a meeting of a city council to make them speak the truth may be made at a subsequent meeting. *Mayor v. Davis*, 94.
 9. **IF THE MINUTES OF A MEETING OF A CITY COUNCIL ARE AMENDED** at a subsequent meeting thereof, the only remedy of a person injured thereby, and who claims that the original entry was correct, is by a direct proceeding to have the minutes as amended annulled, and the original minutes restored. While the amended minutes remain, they cannot be impeached or varied in a collateral proceeding. *Mayor v. Davis*, 94.
 10. **LIABILITY FOR ICE ON SIDEWALK.**—The presence of ice on sidewalks in a city, if produced by natural causes, such as drippings from snow or ice on adjacent buildings or the operation of the laws of gravitation and temperature, is not of itself such a defect in the sidewalk as makes the

city liable for an injury to a person who slips and falls thereon, because of such accumulation of ice. *Hausmann v. City of Madison*, 834.

11. **ICE ON SIDEWALKS—CONTRIBUTORY NEGLIGENCE.**—A person who, in passing along the street of a city in the daytime with nothing to divert his attention, and with knowledge of an accumulation of ice upon the sidewalk produced by natural causes and the laws of gravitation and temperature, slips and falls upon such ice when he can pass without coming in contact with it, is guilty of contributory negligence, and cannot recover from the city for his injury. *Hausmann v. City of Madison*, 834.
12. **DEFECTIVE DRAINAGE—LIABILITY FOR.**—When a city in grading a street builds a high embankment across a natural watercourse, and constructs a culvert through it sufficient for the passage of the stream, and subsequently another person or corporation places a high embankment on its own land adjacent to such street, and constructs a similar drain on the same plan as that adopted by the city, but the latter drain becomes obstructed, and dams up the water so as to flood private property, the fact that the city permits such person or corporation to join its drain to that constructed by the city does not render the latter liable for the injury thus caused. *Kansas City v. Brady*, 349.
13. **LIABILITY FOR ACTS OF OFFICERS.**—A city is liable only for the acts of its officers performed within the lines of their duties, and if a city engineer plans a defective drain constructed by private persons, which subsequently causes injury to private property, the city is not liable therefor. *Kansas City v. Brady*, 349.
14. **STREET ASSESSMENTS.**—A CHANGE IN THE GRADE OF A STREET MADE AFTER THE RESOLUTION REQUIRING IT TO BE GRADED has been adopted, and after the time for protesting by property owners has expired, renders the proceeding under such resolution void, and a new resolution and proceedings thereunder are necessary before the property can be made liable for an assessment for the costs of grading to the new grade, where the change in the grade materially enhances the costs to the property owners. Whether such a change has resulted is a question of fact to be determined by the court or jury. *Mason v. Sioux Falls*, 802.
15. **STREET ASSESSMENTS.**—IF WORK NOT INCLUDED IN THE RESOLUTION OF INTENTION is done upon a street, and the expense thereof included in an assessment, such assessment cannot be enforced unless all the work is properly included therein, in cases where there is no difficulty in determining what was the cost of the work authorized. *Mason v. Sioux Falls*, 802.
16. **STREET ASSESSMENTS.**—TO RENDER PROPERTY SUBJECT to the cost of street assessments, the requirements of the statute must be strictly complied with. *Mason v. Sioux Falls*, 802.
17. **A STREET ASSESSMENT CANNOT BE RESISTED ON THE GROUND THAT THE MUNICIPALITY HAS NO TITLE** to the property used and improved as a street, unless it also appears that the city will probably not acquire title to such street, and that the benefit of any improvement to be made will be lost to the public. *Mason v. Sioux Falls*, 802.
18. **STREET ASSESSMENTS.**—IT IS NOT NECESSARY THAT A MUNICIPALITY SHOULD HAVE ACQUIRED TITLE TO A STREET to enable it to levy and collect assessments for the improvement thereof. It is sufficient that the owner of the fee has permitted the land to be used as a street for such a length of time that the public accommodation and private rights might

be materially affected by the interruption of the enjoyment. *Mason v. Sioux Falls*, 802.

19. **INJUNCTIONS—OBSTRUCTIONS IN STREETS.**—A city, in its corporate capacity, may maintain a suit in equity to obtain an injunction to prevent threatened obstructions or serious unlawful injuries to public streets. *Eau Claire v. Matzke*, 900.

See **CERTIORARI**, 1.

MUTUALITY.

See **CONTRACTS**, 4; **SPECIFIC PERFORMANCE**, 2.

NEGLIGENCE.

1. **WHAT CONSTITUTES.**—To constitute actionable negligence a duty must exist on the part of the defendant to protect the plaintiff from the injury of which he complains, coupled with a failure to perform that duty, and an injury to the plaintiff arising from such failure. *Faris v. Hoberg*, 261.
2. **PROXIMATE CAUSE** is the efficient cause—the one that necessarily sets the other causes in operation. Causes that are merely incidental, or instruments of a superior or controlling agency, are not the proximate causes, though they may be nearer in time and more immediate to the result. *Pennsylvania Co. v. Congdon*, 251.
3. **WHETHER THE MERE FAILURE TO LOOK FOR A STREET-CAR** by a person driving along the street is negligence is a question for the jury under proper instructions. *Benjamin v. Holyoke etc. Ry. Co.*, 446.
4. **PRESUMPTION OF FROM ACCIDENT.**—If a person driving in a public street is struck by a broken iron, part of an ear used to clasp a trolley wire and apply to it a strain from the guy, in order to keep the trolley wire in place around a curve and over a track, these facts, in the absence of other evidence, justify and require the jury to find negligence on the part of the defendant. If, however, defendant offers evidence tending to show due care on its part in the selection and inspection of its apparatus, then it is for the jury to determine from all the evidence whether defendant was negligent or not. *Ugla v. West End etc. Ry. Co.*, 481.
5. **DEGREE OF CARE REQUIRED.**—In an action founded upon alleged negligence it is proper to instruct the jury that, in determining the question, they should take into consideration, as one of the most important facts, the apparent danger—what would happen if there was a failure to use proper care, and if there was a danger of causing loss of life or of great serious bodily injury to persons traveling upon the street, they might properly say that reasonable care would be a high degree of care, because it would be the degree of care commensurate with the apparent danger. *Ugla v. West End Ry. Co.*, 481.
6. **IF THE NEGLIGENCE OF A PARENT CONTRIBUTES TO THE DEATH** of a child too young to be capable of taking care of himself, his testator cannot recover therefor against another, to whose negligence such death was also due. *Grant v. Fitchburg*, 449.
7. **THAT THE NEGLIGENCE OF A PARENT CONTRIBUTED TO THE DEATH OF A CHILD**, so that there can be no recovery therefor, is established by proof that he was only twenty months old, that when last seen before his death he was at the open gateway of a dooryard at the boundary of a

public street, that he had been left alone there once before on that day, and that on this occasion his mother took no measures to ascertain where he was for a quarter of an hour or more, that he went out upon the street unattended, and in some way, not discovered, got through a hole in a curbstone into a catch-basin, from which his death resulted. *Grant v. Fitchburg*, 449.

8. NEGLIGENCE OF A PARENT in suffering a child to go upon a public street, unattended, when it is too young to exercise proper care of itself, will not preclude a recovery for injuries sustained by it from the negligence of a third person, if, while on the street, it did nothing which could be deemed careless if its movements had been directed by an adult person in charge, of ordinary and reasonable prudence. Hence, if, though unattended, it started to run across a street in front of a horse and carriage then standing still, and in charge of the owner, who was sitting in the vehicle talking to another person, and such owner, without looking, suddenly started his horse, and thereby caused it to run over the child, the negligence in leaving it without attendants does not preclude a recovery, if its act in running across the street under the circumstances was, in the opinion of the jury, such an act as it might have been permitted and directed to do had it been in charge of a prudent adult. *Wiswell v. Doyle*, 451.
 9. PLEADING.—A GENERAL AVERMENT OF NEGLIGENCE in the management of a street-car, whereby plaintiff's horse was caused to spring to one side and upset the vehicle in which he was riding, is sufficient to include negligence in the injudicious sounding of a gong. *Benjamin v. Holyoke etc. Ry. Co.*, 446.
 10. DIRECTING VERDICT.—If a party alleging negligence fails to establish by proof all of the elements necessary to constitute it, the court may instruct the jury to return a verdict for the defendant, as when there is no conflict in the evidence or a total failure of proof as to an essential element of the negligence. *Furis v. Hoberg*, 261.
- See AGENCY, 3; BAILMENT; BANKS, 7; CARRIERS, 4; CONFLICT OF LAWS; DAMAGES, 8; MASTER AND SERVANT, 6-8; WATERS, 1.

NEGOTIABLE INSTRUMENTS.

1. NEGOTIABLE PAPER NEGOTIATED FOR VALUE BEFORE MATURITY to a *bona fide* holder is not subject to any defense available against the payee, nor to any setoff or recoupment. *First Nat. Bank v. Slaughter*, 88.
2. The fact that a note otherwise negotiable contains a provision for the payment of attorneys' fees, and waives all exemptions, and stipulates that the property for which it was given shall remain as security for the debt, does not destroy its negotiability. *First Nat. Bank v. Slaughter*, 88.
3. PRACTICE—TRANSFERRING CAUSE TO EQUITY.—The defense of fraud and want of consideration in an action on a promissory note, and that plaintiff purchased with notice thereof is triable at law, and does not require the cause to be transferred to equity. *Richards v. Monroe*, 301.
4. EVIDENCE—CONSPIRACY.—IF THE DEFENSE OF FRAUD AND WANT OF CONSIDERATION IS INTERPOSED to an action on a promissory note, and that the payee and the first indorser conspired to perpetrate a fraud upon the defendants, and defendants seek to charge the plaintiff with notice through such indorsee, his acts and declarations at the time when he

held the note are admissible as tending to show such conspiracy. *Richards v. Monroe*, 301.

5. **NEGOTIABLE INSTRUMENTS.—NOTICE OF FRAUD OR WANT OF CONSIDERATION** in a negotiable instrument is not implied from such knowledge and information as would put a man of ordinary prudence upon inquiry to ascertain the truth of the matter. The right of a *bona fide* holder, in the usual course of business, cannot be divested by proof that he was negligent and omitted to make inquiries which common prudence would have dictated. *Richards v. Monroe*, 301.
6. **EVIDENCE.—TESTIMONY AS TO WHAT THE PAYEE OF A NOTE SAID** to the maker before and at the time it was executed is admissible to show fraud. *Richards v. Monroe*, 301.
7. **EVIDENCE OF THE AMOUNT PAID BY PLAINTIFF FOR A PROMISSORY NOTE** is admissible, under the code of Iowa, declaring that if a note is procured by fraud, the plaintiff, though a purchaser for value, without notice of the fraud, is not entitled to recover a greater sum than he has paid with interest and costs. *Richards v. Monroe*, 301.
8. **LOANS—DEMAND OF PAYMENT.**—When a time note is given with a pledge of stocks as collateral security under an agreement that in case of depreciation in the market value of the securities the maker of the note shall, upon demand, make a payment on account, so that the market value of the securities shall be more than the amount unpaid, a depreciation in the market value of the securities before the maturity of the note does not convert the loan into a call loan, and a call for the whole amount of the loan at such time is not a demand in conformity with the condition in the contract. *Dimock v. United States Nat. Bank*, 643.

See AGENCY, 2; COMPOUNDING FELONY; PAYMENT.

NEW PROMISE.

See LIMITATIONS OF ACTIONS.

NEW TRIAL.

See APPEAL, 4, 10, 13-15; TRIAL, 5.

NOTICE.

See ADOPTION, 9, 12, 15; ADVERSE POSSESSION, 2; EVIDENCE, 3; FIXTURES, 3; INSURANCE, 12, 30, 32, 35; MORTGAGES, 2, 3; RAILROADS, 8, 9; TAXES, 3.

NOVATION.

See CONTRACTS, 6.

NUISANCE.

1. **ALL DAMAGES FOR OBSTRUCTING A RIGHT OF WAY MUST BE RECOVERED IN A SINGLE ACTION** if the obstruction consists of a permanent brick building rendering the way impassable for any purpose. *Hodge v. Shaw*, 290
2. **ALL DAMAGES FOR A NUISANCE ARE RECOVERABLE IN ONE ACTION** WHEN it is of such a character that its continuance is necessarily an injury, and it is of a permanent character which will continue without change from any cause but human labor. *Hodge v. Shaw*, 290.

See RAILROADS, 29-31.

OBSTRUCTIONS.

See **INJUNCTIONS; MUNICIPAL CORPORATIONS, 19; NUISANCE, 1; RAILROADS,**
29-31.

OCCUPATION.

See **TAXES, 5.**

OFFICERS.

1. **RIGHTS OF HOLDER OF CERTIFICATE OF ELECTION**—One duly declared elected to office by proper authority, and who, after receiving a certificate of election, has duly qualified, is *prima facie* entitled to the office when his term begins, as against every one except a *de facto* officer in possession under color of authority. *State v. Oates, 912.*
2. **QUALIFICATIONS—PREVIOUS MISCONDUCT.**—There is no restriction upon the power of the people to elect, or the appointing power to appoint, any citizen to office, notwithstanding his previous character, habits, or official misconduct. Nor is there any restriction upon the person elected or appointed to hold the office because of his previous misconduct in another office, in the absence of express constitutional or statutory provision to that effect. *Speed v. Common Council, 555.*
3. **OFFICER DE FACTO.**—If an office exists *de jure*, a person appointed to fill a vacancy therein, who qualifies, is a *de facto* officer, although the assumed appointing power has no power to appoint. *In re Radl, 918.*
4. **DE FACTO OFFICERS.**—One who retains an office after the expiration of his term, claiming that he is re-elected, but without color of authority, is not a *de facto* officer, as against one who holds the certificate of election to the office, and has qualified as required by law. *State v. Oates, 912.*
5. **DE FACTO OFFICERS** are those who are in possession of office and discharging their duty under color of authority. By color of authority is meant authority derived from an election or appointment, however irregular or informal, so that the incumbent is not a mere volunteer. *State v. Oates, 912.*
6. **OFFICERS DE FACTO.**—If, in the belief that a municipal charter has been forfeited for nonuser, proceedings are taken for the reincorporation of the municipality which are void because of the pre-existing incorporation, and the officers provided for in the new and the old charters are the same, as also are the duties of their offices, officers elected under proceedings prosecuted in the manner authorized by the new charter, and who took and exercised the duties of their offices in the mistaken belief that they had been elected and were acting under the second charter, are nevertheless *de facto* officers of *de jure* offices, and all their acts as between the corporation and the public or third persons, in their official capacity, are valid for all purposes, and to the same extent as if they had been chosen at elections held under the original organization of the municipality. *Butler v. Walker, 61.*
7. **OFFICERS DE JURE.**—If an election is ordered by *de facto* officers to be held, and is held, in conformity with the law, the persons elected thereat become officers *de jure*, and their title cannot be assailed on the ground that the officers ordering such election were not themselves officers *de jure*. *Butler v. Walker, 61.*

8. **LIABILITY OF TREASURER AND SURETIES.**—A township treasurer, by accepting such office, assumes the duty of receiving and safely keeping the money of the township, and paying it out according to law. He and his sureties are bound to make good any deficiency which may occur in the funds which come under his charge, whether they are lost in bank or otherwise, and any agreement or arrangement to the contrary with other officers of the township does not discharge the treasurer or his sureties. *Rose v. Douglass Township*, 354.
9. **ASSESSORS—LIABILITY OF.**—Assessors are *quasi* judicial officers, and, therefore, are not liable to a person injured by an excessive valuation of his property for the purposes of taxation, and the assessment not being impeachable in a collateral proceeding, an assessor cannot be held liable on the ground that he acted maliciously, and conspired and colluded with his assistants with intent to injure the plaintiff. *Stewart v. Case*, 575.
10. **OFFICIAL BONDS—PRESUMPTION AS TO EXECUTION—ESTOPPEL.**—Sureties who sign an official bond in blank as to the penalty, and then permit it to pass out of their hands in that condition, and it is subsequently filled in with a certain sum as a penalty, and in that condition filed with the county clerk, by the principal, presented for approval and accepted as filled up, are estopped from complaining, as this is *prima facie* evidence that the bond was so filed and accepted by their authority. *Rose v. Douglass Township*, 354.
11. **A STATUTE AUTHORIZING THE REMOVAL OF AN OFFICER** for sufficient cause means legal cause, and not any cause which the board authorized to make such removal may deem sufficient. It must be a cause relating to and affecting the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. It must be one attacking the qualifications of the officer, or his performance of his duties, and showing that he is not a fit and proper person to hold the office. *State v. Duluth*, 595.
12. **REMOVAL—CAUSE FOR.**—The misconduct for which an officer may be removed from office must be found in his acts and conduct in the office from which his removal is sought, and must constitute a legal cause for removal, and affect the proper administration of the office. *Speed v. Common Council*, 555.
13. **REMOVAL OF—INSUFFICIENT CHARGE.**—In proceedings to remove an officer for sufficient cause, general charges without any specification of facts are not sufficient to support an order of removal, as where the officer is charged with using his official position to gratify his personal feelings and prejudices, and acting without ability, impartiality, and sense of justice, and having no just appreciation of the responsibilities that should characterize the discharge of his official duties, and being incompetent and inefficient. *State v. Duluth*, 595.
14. **WHAT IS A SUFFICIENT CAUSE FOR THE REMOVAL OF AN OFFICER IS A QUESTION FOR THE COURTS.** *State v. Duluth*, 595.
15. **CHARGES AGAINST AN OFFICER IN PROCEEDINGS FOR HIS REMOVAL** should specify the causes with such reasonable detail and precision as shall inform him what dereliction of duty is urged against him. *State v. Duluth*, 595.
16. **POWER TO REMOVE OFFICERS AT WILL** excludes the power to put an officer to the expense of a trial for cause and have charges of official misconduct placed before the public. *Speed v. Common Council*, 555.

See CORPORATIONS, 5; MANDAMUS, 1-3; MUNICIPAL CORPORATIONS, 4-6, 13; PROHIBITION, 2, 3; RAILROADS, 9.

OFFICIAL BONDS.

See OFFICERS, 10.

OPINION.

See EJECTMENT, 1; SALES, 9.

PARDON.

1. A PARDON MAY IMPOSE ANY CONDITION that the governor thinks proper, provided it is neither immoral, impossible, nor illegal. *State v. Wolfer*, 582.
2. A PARDON ON CONDITION that the prisoner take up and maintain his residence out of the state during the balance of his life does not impose any impossible, immoral, or illegal condition. Such condition is therefore valid. *State v. Wolfer*, 582.
3. AFTER A CONDITIONAL PARDON, IF IT IS CLAIMED THAT THE PERSON PARDONED HAS NOT COMPLIED WITH THE CONDITION, he must be brought before the court to show cause why execution should not be awarded on his original sentence, and then the court has jurisdiction to inquire and determine whether he is the same person who has been pardoned, and if so, whether he has violated the condition of the pardon. He may, on his part, present any facts constituting an excuse for non-performance of the strict terms of the condition. It is not necessary that he should be proceeded against by indictment or tried by a jury. The court may, if it chooses, submit to the jury an issue as to whether or not he is the prisoner formerly convicted and pardoned; but if it is found or admitted that he is the same person, no other or greater formalities are required in reiterating the sentence, and returning him to imprisonment under it, than when he was brought up for his original sentence. *State v. Wolfer*, 582.
4. AFTER A CONDITIONAL PARDON, THE PRISONER CANNOT BE RECOMMITTED TO THE STATE PRISON WITHOUT ANY HEARING or adjudication upon the mere order of the governor, who has sought to determine *ex parte* that the condition has not been performed. *State v. Wolfer*, 582.

See HABEAS CORPUS, 2.

PARENT AND CHILD.

See ADOPTION; DOMICILE, 2, 3; NEGLIGENCE, 6, 8.

PAROL EVIDENCE.

See BANKS, 1; EVIDENCE, 6, 7.

PARTIES.

See JUDGMENTS, 12.

PARTITION.

1. PARTITION MAY BE DECREED WHETHER THE TITLE IS LEGAL OR EQUITABLE. *Gore v. Dickinson*, 67.
2. A SUIT FOR PARTITION SHOULD EMBRACE ALL THE LANDS OF THE COTENANTS, and if one of them has mortgaged a part of such lands the

others cannot, by their bill of partition, compel him to compensate them for their interest in the property so mortgaged. The mortgage did not affect the interest of the cotenants not parties to it, and the petition should therefore have included the lands mortgaged. *Gore v. Dickinson*, 67.

3. THE FACT THAT INCONVENIENCE AND INJURY WILL RESULT, or mischief be entailed by a partition, or that a division may be embarrassed by difficulties, cannot deprive a cotenant of his right to partition. *Gore v. Dickinson*, 67.
4. PARTITION OF LANDS ADVERSELY HELD may be made by a court of equity if the complainant has an immediate right of entry, but the probate or chancery court, in the exercise of a statutory jurisdiction to sell land for distribution or equitable division, cannot proceed if such lands are adversely held. *Gore v. Dickinson*, 67.
5. JURISDICTION TO MAKE PARTITION IS NOT OUSTED by an allegation in the complaint showing that there are conflicting claims of title, or that the property is adversely held, nor by an allegation that the common ancestor of the parties had made a conveyance which was invalid for want of delivery, and a prayer that such deed be canceled. *Gore v. Dickinson*, 67.
6. ADJUSTING EQUITIES.—If a court obtains jurisdiction in a suit for partition it will ascertain the validity and extent of conveyances made by the parties, and so mould its decree as to meet all equities growing out of their ownership of, and relation to, the property. *Gore v. Dickinson*, 67.
7. ADVERSE POSSESSION.—To make a plea of the statute of fifteen years a good defense to a suit for partition it must show a holding adversely for fifteen years. *Peden v. Cavins*, 276.
8. CLAIM FOR IMPROVEMENTS—COUNTERCLAIM FOR RENTS.—When, in an action for partition, one tenant claims reimbursement for improvements made while in possession, the other tenants may set up a counterclaim for rents and profits due them, and received by the tenant in possession prior to making the improvements, and the court must take such rents and profits into account in making the adjustment. *Peden v. Cavins*, 276.
9. STATUTE OF LIMITATIONS OF TWENTY YEARS is not applicable to an action of partition. *Peden v. Cavins*, 276.
10. COMMISSIONERS' REPORT—VARIANCE.—A motion to set aside the report of commissioners in partition on the ground of a variance between the description of the land in the order for partition and the description in the report of the commissioners is properly refused, unless such variance affirmatively appears of record. *Peden v. Cavins*, 276.
11. TRIAL BY JURY.—When, in an action for partition, issues are joined on a cross-complaint demanding an accounting between the tenants, and involving matters of exclusive equitable jurisdiction, triable by the court alone, a demand for a trial of the whole case by a jury is properly refused. *Peden v. Cavins*, 276.

See COTENANCY, 9.

PARTNERSHIP.

1. WHAT CONSTITUTES.—A partnership is the contract relation subsisting between persons who have combined their property, labor, and skill in

an enterprise or business, as principals, for the purpose of joint profit. *Spaulding v. Stubbings*, 888.

2. **WHAT CONSTITUTES—DEATH OF PARTNER AS AFFECTING LIABILITY.** A contract between two parties reciting that one has loaned the other a certain sum of money which he agrees to repay in five years with the highest legal rate of interest annually, and also reciting that the borrower is engaged in carrying on a certain business, and obligating him to keep correct account books, open at all times to the inspection of the other, and to pay the latter one-half of the net profits, constitutes, as between the parties a contract of partnership, especially if the lender thereafter makes further advances, and to some extent assumes active management of the business; and the liability of the lender as a partner is not terminated by the death of the borrower, when the business is continued by his administrator with the full knowledge and consent of the lender who continues to make advances and carry it on. *Spaulding v. Stubbings*, 888.
3. **COTENANTS.—PARTNERSHIP AGREEMENT** between cotenants to drill oil wells on the common property, each to pay one-half of the expense of producing and pumping the oil, to be run into pipe lines serving the district and there credited one-half to each of them, does not constitute a partnership between them. *Butler Sav. Bank v. Osborne*, 665.
4. **A PARTNERSHIP MAY BE FORMED BY PAROL TO DEAL IN REAL ESTATE.** *Fountain v. Menard*, 617.

See **COTENANCY**, 1-3; **EXECUTION**, 6, 7.

PATENTS.

See **SURVEYS**, 3.

PAYMENT.

1. **WHAT IS NOT.**—An agreement that defendant would sell and plaintiff buy certain property, and that a promissory note theretofore given by defendant to plaintiff should be received in part payment of the purchase price, does not, though such property is tendered to plaintiff, constitute a payment of such note, and, therefore, is no defense to an action thereon. Such agreement is not itself a satisfaction of the note, nor is it a new contract substituted for, and entitling defendant to, the note. *Hayes v. Allen*, 474.
2. **WHAT IS NOT.—THE GIVING OF A NOTE AND A CHATTEL MORTGAGE** by a debtor to his creditor will not be presumed to be in payment of a pre-existing debt to the extent of the note and mortgage, and though they are assigned as collateral, and are foreclosed by such assignee, there is no presumption that the mortgagor is entitled to be credited the amount of his note or any other sum in the absence of all evidence as to the amount realized on the foreclosure, and as to the value of the property mortgaged. *Baker v. Baker*, 776.

See **AGENCY**, 1, 2; **RELEASE**.

PENALTY.

See **DAMAGES**, 6, 7.

PERSONAL PROPERTY.

See **ASSIGNMENT FOR THE BENEFIT OF CREDITORS**; **FIXTURES**, 3.

PHYSICIANS AND SURGEONS.

See WITNESSES, 2, 3.

PLATS.

See BOUNDARIES, 8-10.

PLEADING.

1. **A COMPLAINT MUST BE CONSTRUED** according to its general scope and tenor, as appears from the averments, and the prayer does not control and determine its sufficiency. If the trial court has placed a reasonable construction upon averments, which might bear two constructions, the appellate court is always disposed to adhere to the construction of the trial court. *Comegys v. Emerick*, 245.
2. **ISSUANCE OF EXECUTION.**—An allegation in a complaint that on a certain day execution was in due form issued upon a certain judgment to the sheriff, and duly returned by said sheriff wholly unsatisfied, sufficiently shows that legal execution has been issued on such judgment and returned unsatisfied. *Pierstoff v. Jorge*, 881.
3. **REMEDY AT LAW—DEMURRER ORE TENUS.**—When the subject matter of an action is of equitable cognizance, a demurrer *ore tenus* does not go to the point that the plaintiff has an adequate remedy at law, but only raises the question whether the complaint states a cause of action in equity. *Pierstoff v. Jorge*, 881.
4. **A BAD REPLY IS GOOD TO A BAD ANSWER**, and it is not error to overrule a demurrer to such reply. *Peden v. Carins*, 276.
5. **PRACTICE IN EQUITY.**—A SUPPLEMENTAL BILL may be filed, or a bill may be amended, by alleging matters occurring after the commencement of a suit, so as to present facts which will enlarge the extent, or change the kind, of relief, but not to aid an original bill prematurely filed, by asserting a cause of action which has become perfect since suit was brought, there being at that time no cause of action in favor of the complainant. *Bernard v. Toplitz*, 465.
6. **JUDGMENTS—"DULY GIVEN OR MADE."**—Under a statute providing that in pleading a judgment of a court of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment may be stated to have been duly given or made, an allegation that plaintiff recovered a judgment against defendant, and that it was duly docketed, is equivalent to an allegation that such judgment was "duly given or made." *Pierstoff v. Jorge*, 881.
7. **CONFLICT OF LAWS—PLEADING STATUTES OF ANOTHER STATE.**—A plea averring that certain designated persons of the state of Iowa, in conformity with the laws thereof, made and delivered two instruments in writing in words and figures, to wit, sufficiently avers the laws of that state as a matter of pleading. *Consolidated Tank Line Co. v. Collier*, 181.
8. **EXTRINSIC MATTERS.**—IN DETERMINING THE VALIDITY OF A PLEADING it is not competent for the court to consider any thing which does not appear on the record. *Hanover etc. Ins. Co. v. Brown*, 386.
9. **AN IMPROPER DEPARTURE IN PLEADING TAKES PLACE WHEN** the declaration is upon a policy of insurance to enforce a contract liability to the plaintiff, and the replication brings forth a new and distinct cause of action, founded on several assignments of claims for contribu-

- tion alleged to be due to other insurance companies. *Hanover etc. Ins. Co. v. Brown*, 386.
10. AN INJURY TO THE LANDLORD'S REVERSION is disclosed by a pleading which avers acts done by the defendant constituting an injury to the freehold. There need not be any formal statement that the reversion was injured. *Arneson v. Spawn*, 783.
 11. PLEADING FRAUD IN TRANSFERS OF PROPERTY.—An allegation that a transfer was made with intent to defraud creditors of the grantor, and that the grantee well knew the intention of the transfer, is a sufficient averment of fraud to support an attack upon such transfer as fraudulent, although there is no allegation that the grantor had no other property subject to execution. *Probert v. McDonald*, 796.
 12. REFERRING TO DOCUMENTS.—A PAPER CANNOT BE INCORPORATED IN A PLEADING by reference to it. If it is desirous to show to the court the contents of a paper, this may be done by exhibiting it, or by averring the legal effect of its contents. *Hanover etc. Ins. Co. v. Brown*, 386.
 13. PRACTICE.—IRRELEVANT defense of a character that may embarrass and prejudice the plaintiff in preparing for trial and maintaining his action should be stricken out on motion. *National Distilling Co. v. Cream City Importing Co.*, 902.
 14. AMENDMENT.—When, in ejectment, defendant's abstract of title omits matter material and relevant to the defense, the court should permit an amendment thereof to include the omitted matter upon such terms as are fair and just. *Meade v. Clarke*, 669.
- See APPEAL, 7, 9; ESTOPPEL, 2; FRAUDULENT CONVEYANCES, 3; INDICTMENT; INSURANCE, 16; MALICIOUS PROSECUTION, 2, 3; MASTER AND SERVANT, 13, 16; NEGLIGENCE, 9; RAILROADS, 26, 27.

PLEDGE.

1. STOCKS—CONVERSION—RATIFICATION.—When stocks pledged as collateral for the payment of a note are sold by the pledgee without authority before the maturity of the debt, and the pledgor fails to repudiate the sale or treat it as a conversion, and credits the proceeds as a payment on the note, his act is an irrevocable ratification and adoption of the sale. *Dimock v. United States Nat. Bank*, 643.
2. STOCKS—CONVERSION—REMEDY.—When stocks pledged as collateral for the payment of a note are sold by the pledgee before maturity of the debt, the pledgor may either ratify the sale and claim the proceeds, treat the sale as a conversion, and require the pledgee to replace the stock, replace it himself, and charge the pledgee for the loss, or recover the advance in the market price up to a reasonable time within which to replace after notice of the sale, or he may hold the pledgee for a breach of his duty to keep the security until the maturity of the debt, and recover as damages the value of the security at that time. *Dimock v. United States Nat. Bank*, 643.
3. A PLEDGE REMAINS VALID THOUGH THE PLEDGED PROPERTY IS GIVEN INTO THE POSSESSION OF ANOTHER HAVING NO KNOWLEDGE OF SUCH PLEDGE, in whose name it is shipped, directed to the pledgors as assignees, if an agent of the pledgee remained in charge of the property during its transportation, and it was never in fact restored to the possession of the pledgors. *Cosley v. Minnesota etc. Ry. Co.*, 600.

- 4. A PLEDGE IS NOT TERMINATED BY A SALE OF THE PLEDGED PROPERTY TO THE PLEDGEE** so that a garnishment levied after the pledge, and before the sale, takes precedence over the rights of the pledgee under the pledge. *Cooley v. Minnesota etc. Ry. Co.*, 609.

See ATTACHMENT, 5; NEGOTIABLE INSTRUMENTS, 8.

POSSESSION.

See ADVERSE POSSESSION; FISHERIES, 2. PLEDGE, 3; TRESPASS.

POWERS.

See INSURANCE, 4.

PREMIUMS.

See INSURANCE, 1, 12, 13, 17, 18, 31.

PRESCRIPTION.

See ADVERSE POSSESSION, 9, 11; DEDICATION, 1; EQUITY, 4.

PRESUMPTION.

See ADVERSE POSSESSION, 2; DAMAGES, 1; DEEDS, 3; EXECUTION, 1, 2, HUSBAND AND WIFE, 1, 3; NEGLIGENCE, 4; RAILROADS, 28; WILLS, 2, 3.

PRINCIPAL AND AGENT.

See AGENCY.

PRIVITY.

See CONTRACTS, 6, 7.

PRIVILEGED COMMUNICATIONS.

See ATTORNEY AND CLIENT; LIBEL, 2.

PROCESS.

INQUISITORIAL PROCESS.—The process of courts of justice can never be used for inquisitorial purposes, or for oppression, and such use be sustained. *Rosenthal v. Circuit Judge*, 535.

See ATTACHMENT, 1; MARRIAGE AND DIVORCE, 5.

PROHIBITION.

1. THE WRIT OF PROHIBITION LIES to prohibit the exercise by an inferior tribunal or officer of judicial powers with which he is not legally vested, and to prevent actions in excess of the jurisdiction conferred by law, and not to regulate or control the manner in which a lawful jurisdiction shall be exercised. *Speed v. Common Council*, 555.

2. OFFICERS—REMOVAL OF—WRIT OF PROHIBITION.—The officer or body upon whom the state has conferred power to remove municipal officers does not act in a purely political, administrative, or legislative capacity. Such officer or body acts in a *quasi* judicial capacity, and its method of procedure must be *quasi* judicial in its character. Hence, such officer or body becomes an inferior judicial tribunal, amenable to the writ of prohibition, when acting in excess of the jurisdiction conferred. *Speed v. Common Council*, 555.

3. OFFICERS.—WRIT OF PROHIBITION DOES NOT LIE to test the title of a *de facto* judicial officer. *In re Radl*, 918.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

PROOFS OF LOSS.

See INSURANCE, 11, 35.

PUBLIC LANDS.

1. HIGHWAYS THEREON.—The act of Congress providing "that a right of way for the construction of highways over public lands not reserved for public use is hereby granted," and the act of the legislature of this state declaring that all section lines shall be and are public ways as far as practicable, and that the public highways along section lines shall be sixty-six feet wide, taken from each side of such lines, together constitute as to lands along the section lines an express public grant and dedication for highway purposes, and a subsequent settler upon, and purchaser of, such land receives his title in subordination to the right of the public to use the land adjacent to the section lines as a public highway. *Wells v. Pennington County*, 758.
2. A SETTLER ON THE PUBLIC LANDS ACQUIRES NO VESTED RIGHTS THEREIN until he has entered the same at the proper land-office, and obtained a certificate of entry. Before then the land is subject to the absolute disposing power of Congress. *Wells v. Pennington County*, 758.
3. SETTLEMENT ON THE PUBLIC LANDS CONFERS NO RIGHTS as against the government or its grantees. *Wells v. Pennington County*, 758.

See GRANTS; SURVEYS.

QUIETING TITLE.

See EQUITY, 4.

QUO WARRANTO.

OFFICE AND OFFICERS—MANDAMUS TO CONTEST ELECTION.—QUO WARRANTO is the proper proceeding by which to contest an election. It cannot be contested by *mandamus*. *State v. Oates*, 912.

See MANDAMUS, 2.

RAILROADS.

1. CONSOLIDATION.—When one railroad is consolidated with another, or others, under a new name, it ceases to exist as a corporation. *Berry v. Kansas City etc. R. R. Co.* 371.
2. CONSOLIDATION—LIABILITIES.—When two or more railroad companies are consolidated under the statutes of a state, the new, or consolidated, company is answerable for the obligations of the old, or constituent, company, or companies, including torts, in the absence of all evidence or stipulations to the contrary. *Berry v. Kansas City etc. R. R. Co.*, 371.
3. SURFACE WATER—RAILROAD EMBANKMENT.—A railroad company may lawfully protect its right of way against the flow of surface water by building an embankment thereon, and it is not liable in damages to an adjoining owner whose land is overflowed from an accumulation of surface

water caused by such embankment. *Edwards v. Charlotte etc. R. R. Co.*, 746.

4. **SURFACE WATER—RIGHTS OF RAILWAY COMPANY.**—A railroad company has the same rights as a private landowner to protect its right of way against the flow of surface water. *Edwards v. Charlotte etc. R. R. Co.*, 746.
5. **EMBANKMENTS—LIABILITY FOR SURFACE WATER.**—A railroad company which, for the purpose of properly constructing its roadbed on its own right of way, takes earth from one part of its premises and uses it upon such roadbed, thus leaving an excavation or ditch along each side of it, this being the ordinary way of constructing railroads in prairie countries, is not liable to an adjoining landowner for injuries caused by an accumulation, or the prevention of an accumulation, of surface water occasioned by such embankment. *Missouri Pac. Ry. Co. v. Renfro*, 344.
6. **LIABILITY FOR SURFACE WATER.**—A railroad company is not compelled to construct a culvert upon its own land to carry off surface water. *Missouri Pac. Ry. Co. v. Renfro*, 344.
7. **LIABILITY FOR SURFACE WATER.**—The fact that a railroad company raises an embankment upon its own land which prevents the surface water falling and running upon the land of an adjoining owner from running off such land, and causes it to accumulate thereon, to its damage, gives to the latter no cause of action against the former, nor is the rule changed by the fact that a culvert could have been made under such embankment sufficient to have afforded an outlet for all surface water, nor by the fact that a culvert placed therein was insufficient to afford such outlet. *Missouri Pac. Ry. Co. v. Renfro*, 344.
8. **LIABILITY FOR KILLING STOCK—NOTICE OF CLAIM.**—A letter from an owner to a railroad company notifying it of the killing of his stock by its train, of the time and place of the killing, and requesting to be informed as soon as possible what the company would pay him for the stock, is admissible as evidence of notice and claim for damages under a statute making railroad companies liable for failure to erect and maintain proper fences and guards to exclude stock from their tracks, although such letter fails to state the amount of damage claimed. Another letter stating the amount claimed is also admissible in evidence, although it was not written until some time after the killing, and contained an offer to take less than the owner believed himself entitled to. The letters together constitute ample notice and presentation of the claim. *Jacksonville etc. Ry. Co. v. Harris*, 127.
9. **LIABILITY FOR STOCK KILLING—NOTICE OF CLAIM TO AGENT OF COMPANY.**—It cannot be assumed, as matter of law, that the general attorney of a railroad is not a general agent or officer thereof for the purpose of notification and presentation of a claim for stock killed by the company, in the absence of any attempt by it to show that he was not such officer or agent, or any objection to proof of demand upon him on the ground that he was not a proper representative of the company. *Jacksonville etc. Ry. Co. v. Harris*, 127.
10. **LIABILITY FOR KILLING STOCK—SUFFICIENCY OF COMPLAINT.**—A complaint alleging that a railroad company did not maintain fences on the sides of its road sufficient to exclude livestock therefrom, and, for want of such fences, two horses of plaintiff, without negligence on his part, strayed and went upon the railroad at a certain place not at a crossing,

and where such fences were necessary, and were there killed by a certain engine belonging to such company, giving the value of the horses so killed, is good and sufficient as against a motion for arrest of judgment on the ground that the complaint does not show that the damage was caused by a failure to erect and maintain fences or stockguards. *Jacksonville etc. Ry. Co. v. Harris*, 127.

11. **CONSTRUCTION OF FENCE LAW, AND LIABILITY THEREUNDER.**—The general requirement of the Florida railroad fence law is the erection and maintenance, by corporations and persons operating railroads, of substantial fences on both sides of the railroad track, and the fences must be sufficient to exclude all livestock from the road, or at least such stock as is not shown to be breachy, with the limitation that in lieu of fences, stockguards shall be erected and maintained at public crossings, and at such other crossings as may be necessary for the use of owners or tenants of land adjoining a railroad. A failure to maintain such fences or guards makes the company liable for damage by its engines or cars to livestock caused by such failure. Where there is no crossing of the character indicated the duty is to maintain a fence of the character named, and, as between the owner of stock and the company, a gap and bars are regarded as a fence, and must be kept in the condition necessary for excluding and turning stock. If the company has erected a sufficient fence, and it is thrown or broken down without the company's knowledge, or by the act of God, or by strangers, without the company's knowledge or consent, the law accords to the company a reasonable time for ascertaining the fact, and restoring the fence, and if any damage is caused by the fence being thus down before there has been a reasonable time or opportunity for restoring it, after being aware of its being down, or for learning of its being down, and restoring it, the company is not liable, and the same rule applies when bars or gates are left open without the company's knowledge, consent, or fault. *Jacksonville etc. Ry. Co. v. Harris*, 127.
12. **LIABILITY FOR KILLING STOCK.**—When a gap, with bars, in a railroad fence not at a crossing is used with the knowledge of the company by persons hauling and supplying it with wood under contract, and the bars are left down by such persons, and livestock pass through the gap and are killed by the company's train, the parties so leaving the bars down cannot be regarded as strangers to the company. Their acts must be deemed the acts of the company, and it is liable for the damage resulting to the owner of the stock. *Jacksonville etc. Ry. Co. v. Harris*, 127.
13. **LIMITATION ON RIGHTS OF PASSENGER.**—A person who purchases a railway ticket to a certain place, and takes his seat in a particular train that goes to his destination, cannot, if the ticket specifies that it is "not good to stop off en route," without permission of the railway company, while the train is reasonably pursuing the duty of the carrier, leave it and take another train and complete his journey under the same contract. His contract is entire, and neither he nor the company can be required to perform it in fragments. *Pennsylvania R. R. Co. v. Parry*, 654.
14. **TICKETS—REGULATIONS.**—A railway ticket is a mere token that fare has been paid, and that the passenger has the right to be carried to the destination it indicates according to the reasonable regulations of the company. Such regulations, at least so far as they are known to

the passenger, enter into the contract of carriage, and it is his duty to conform to them. Such ticket need not fully set out the contract of carriage. *Pennsylvania R. R. Co. v. Parry*, 654.

15. **DUTY OF CONDUCTOR TO PROTECT PASSENGER FROM ILLEGAL ARREST.**—When a railroad detective officer telegraphs to a conductor on a train, to have two described passengers arrested at a certain station, and the telegram is received by the baggage master at such station, who calls policemen to await the arrival of the train, and such policemen upon its arrival enter the train, and the conductor, upon receiving the telegram, points out a passenger as the one to be arrested, if it transpires that the passenger arrested is not the person intended by the telegram it is a question for the jury to determine, in an action against the company to recover for such arrest, whether the conductor took an unwarranted part in the illegal arrest, or whether he properly performed his duty in relation to the protection of the passenger. *Duggan v. Baltimore etc. R. R.*, 672.
16. **POWER OF CONDUCTORS—PROTECTION TO PASSENGERS.**—A railroad conductor has general power and control over his train and all persons on it, with authority to compel observance of the regulations of the company, to preserve order, and to employ the whole force of trainmen and of passengers willing to assist for these purposes. These powers involve the correlative duty to protect passengers, not only from injury by negligence or accident, but also from violence and illegal annoyance or interference by other parties, but he is not required to enter into a contest with, or put himself in opposition to, officers of the law, and if he merely stands by, without taking part in the arrest of a passenger by known policemen, he is not necessarily bound to inquire into their authority, or to assert his own against it. *Duggan v. Baltimore etc. R. R.*, 672.
17. **EJECTION OF PASSENGERS—DAMAGES.**—A passenger on a railroad who receives a check from the conductor on the surrender of his ticket, and then goes into another car, where his fare being again demanded he fails to produce his check, claiming that none was given, and upon his refusal to go into the other car for identification is ejected from the train cannot recover therefor. *Lucas v. Michiyan etc. R. R. Co.*, 517.
18. **EJECTION OF PASSENGER—EXEMPLARY DAMAGES.**—A passenger on a railroad train who receives no check on surrendering his ticket, and then goes into another car, where his fare being again demanded he informs the conductor of the facts, and offers to go into the other car for identification, which offer the conductor refuses to accept ejecting him from the train on a dark night remote from his home or a station is entitled to recover not only actual damages but also additional damages for whatever injury to his feelings or of indignity, pain, and disgrace such conduct tends to produce in view of the time, place, and circumstances; but it is error to instruct the jury that he is entitled to exemplary damages without explaining that term. *Lucas v. Michiyan etc. R. R. Co.*, 517.
19. **CARRIERS—NEGLIGENCE—DUTY OF PASSENGER TO ANTICIPATE DANGER FROM RUNAWAY HORSE.**—A passenger entitled to safe transportation over a railroad and connecting ferry, who, upon invitation from the railroad company, passes from the ferryboat by a vehicle-way, and while so doing is struck and injured by a wild and uncontrolled runaway horse belonging to the company, is not guilty of contributory

- negligence so as to prevent recovery. In such case the passenger is not bound to anticipate the career of such horse. *Watson v. Camden etc. R. R. Co.*, 624.
20. **APPROACHES TO DEPOTS.**—As to passengers or persons with a *bona fide* intention of taking a train, railroad companies are required to exercise an extraordinary degree of care in making and keeping up safe approaches to their passenger depots. *Johns v. Charlotte etc. R. R. Co.*, 709.
21. **NEGLIGENCE—STATION APPROACHES.**—A railway carrier is liable for negligence in its construction or maintenance in repair of its station approaches, station buildings, and station platforms, and for its failure to adequately light them. *Johns v. Charlotte etc. R. R. Co.*, 709.
22. **DEPOT APPROACHES—NEGLIGENCE.**—A railway company holding out an invitation to persons wishing to take passage in its cars by day or night, to reach such cars, and embark thereon, by crossing a high trestle used as a bridge, is required to exercise extraordinary care to prevent injury to such persons, and is liable for slight negligence. *Johns v. Charlotte etc. R. R. Co.*, 709.
23. **FELLOW-SERVANTS.**—A railroad company is not liable to one of its agents for an injury arising from the negligence of another competent agent. *Jenkins v. Richmond etc. R. R. Co.*, 750.
24. **FELLOW-SERVANTS—WHO ARE.**—A conductor on a freight train and an assistant fireman on a following freight train, both belonging to the same company, are fellow-servants, and take the risk of each other's negligence. *Jenkins v. Richmond etc. R. R. Co.*, 750.
25. **FELLOW-SERVANTS.**—A railway company which furnishes a safe track and competent servants is not liable for the result of a collision arising from its track being temporarily dangerous at the time by the omission of its servant to give the usual and necessary notice of an obstruction thereon to a fellow-servant on an approaching train, which results in an injury to such fellow-servant. *Jenkins v. Richmond etc. R. R. Co.*, 750.
26. **MASTER AND SERVANT—NEGLIGENCE—SUFFICIENCY OF COMPLAINT.**—In an action by a brakeman against a railway company to recover for personal injuries caused by a defective lantern it must be alleged and proved that the defect was known to the company, or was such as, with reasonable diligence, it ought to have been known. *Pennsylvania Co. v. Congdon*, 251.
27. **MASTER AND SERVANT—NEGLIGENCE—SUFFICIENCY OF COMPLAINT.**—In an action by a brakeman against a railroad company to recover for injury caused by reason of a defective lantern furnished him by the company for his necessary use in the discharge of his duty, but kept in his custody, a complaint showing that the brakeman knew, or ought to have known, of the defect, and failing to allege that the company knew, or ought to have known, with the exercise of proper diligence, of the defect, is insufficient, notwithstanding a general allegation that the defect was unknown to the brakeman. *Pennsylvania Co. v. Congdon*, 251.
28. **MASTER AND SERVANT—NEGLIGENCE—PRESUMPTION.**—It will be presumed that a brakeman, eighteen years of age, who had been in the railroad service three months, had sufficient skill and experience to know that a lantern, constantly used by him, would go out because not properly guarded from the wind, so as to charge him with knowledge of its condition, and the duty to inform the company thereof. *Pennsylvania Co. v. Congdon*, 251.

29. **NUISANCE—OBSTRUCTION OF STREET—RIGHT OF PRIVATE OWNER TO RECOVER.**—The use of a street by a railroad company in such manner as to completely obstruct travel with teams thereon, and to entirely destroy its use as a public highway, constitutes a public nuisance if without permission or authority. To entitle a private owner to recover for such nuisance, it must appear that he has suffered some special or peculiar damage, differing, not merely in degree, but in kind, from that which is deemed common to all, but a complaint by such owner alleging such special and peculiar damage in the loss of business, access to, or egress from, his property, and value thereof, states a good cause of action. *Evans v. Chicago etc. Ry. Co.*, 908.
30. **OBSTRUCTION OF STREET.**—An instrument granting a railroad company the right to construct, maintain, and operate its road in the street in front of the grantor's lot, "as the same was at the date of said instrument constructed," does not give the company any right thereafter to destroy such street as a public highway in front of such lot. *Evans v. Chicago etc. Ry. Co.*, 908.
31. **OBSTRUCTION OF STREET.**—A railroad company cannot monopolize a street in derogation of the public or private use to which it has been applied. Such use of the street is a nuisance, and may be abated as such. *Evans v. Chicago etc. Ry. Co.*, 908.
32. **NEGLIGENCE.**—THE CONTINUING OF THE DRIVER OF A STREET-CAR TO KEEP UP ITS SPEED AND TO KEEP SOUNDING A GONG when it is obvious that a person driving along the street is in difficulty from the fright of his horse, may be evidence of negligence sufficient to warrant the jury in finding the existence of such negligence, and that the accident which followed was the result thereof. *Benjamin v. Holyoke etc. Ry. Co.*, 446.
- See CORPORATIONS, 3; DAMAGES, 8, 11; FRAUD; MASTER AND SERVANT, 2, 17; SPECIFIC PERFORMANCE, 2, 3, 7.

RATIFICATION.

See AGENCY, 3; ESTOPPEL, 3; PLEDGE, 1.

REAL PROPERTY.

1. **LICENSEES ON THE PREMISES OF ANOTHER.**—If, at the request of the principal of a school, a class of his pupils are granted permission to visit the power-house of a traction company, each of the members of such class are mere licensees or volunteers, and, therefore, cannot maintain an action for injuries suffered from falling into a vat of hot water, located in a part of the building insufficiently lighted and of the existence of which no warning was given. *Benson v. Baltimore Traction Co.*, 436.
2. **LICENSEE ON THE PREMISES OF ANOTHER, WHO IS.**—The distinction between an invitation and a license to go upon the premises of another appears to be that the former is inferred where there is a common interest or mutual advantage, while the latter is inferred where the object is the mere pleasure or benefit of the person using it. *Benson v. Baltimore Traction Co.*, 436.
3. **LICENSEE—RISKS ACCEPTED BY.**—A person who visits a portion of a store not frequented by visitors, entirely on his own business, without the owner's invitation or knowledge, is a mere licensee, and cannot recover for an injury received in falling down an open elevator-shaft on that part of the premises. *Faris v. Hoberg*, 261.

4. **LICENSEES—DUTY OF OWNER OF PREMISES.**—The owner of premises is under no legal duty to keep them free from pitfalls or obstructions for the accommodation of persons who go upon or over them without invitation, express or implied, and merely for their own convenience or pleasure, even when this is done with the owner's permission. Such visitors are mere licensees, and enjoy the license subject to the attendant risks. *Paris v. Hoberg*, 261.
 5. **A LICENSEE UPON THE PREMISES OF ANOTHER** must enjoy his license subject to its attendant perils. No duty is imposed on the owner or occupant to keep the premises in a suitable condition for those who come there solely for their own pleasure, and who are not either expressly invited to enter or induced to come upon them by a purpose for which the premises are appropriated and occupied, or by some preparation or adaptation of the plan for use by customers or passengers which might naturally and reasonably lead them to suppose that they might properly and safely enter there. *Benson v. Baltimore Traction Co.*, 436.
 6. **THE FACT THAT A LICENSEE IS PERMITTED TO VISIT AND INSPECT THE PREMISES** of a traction company does not impose upon the company the duty of guarding him from dangers, nor of giving him such warnings as will make his passage through the premises reasonably safe. If there is a dangerous vat of hot water intended to subserve a useful purpose, and not in any proper sense a mantrap, the owner of the premises is not required to make any change therein, owing to the visit he has permitted, nor is he under obligation to detail an employee to attend a visitor through the establishment, and thereby secure him from peril. *Benson v. Baltimore Traction Co.*, 436.
- See **ADOPTION**, 14; **EMINENT DOMAIN**; **ESTOPPEL**, 1; **PARTNERSHIP**, 4.

RECEIPT.

See **FRAUD**; **RELEASE**, 1, 2.

RECEIVERS.

CORPORATIONS.—A RECEIVER WILL NOT BE APPOINTED to take charge of a beneficial corporation, and to administer its assets where it is not alleged to be insolvent. The granting of the relief would necessarily result in the dissolution of the corporation, and the forfeiture of its charter, and this a court of equity has not power to declare and enforce. *Mason v. Supreme Court etc.*, 433.

RECORDS.

See **COURTS**; **DEEDS**, 4-6; **EVIDENCE**, 8, 11; **EXECUTION**, 3; **MUNICIPAL CORPORATIONS**, 9; **PLEADING**, 8.

REDEMPTION.

See **EXECUTION**, 5, 8-10; **MORTGAGES**, 6; **TAXES**, 4.

REFORMATION.

See **DEEDS**, 11.

RELEASE.

1. A RECEIPT FOR THE FULL AMOUNT OF A DEBT ON A PAYMENT OF A SUM LESS than that due is a valid, irrevocable discharge of such debt if the

money paid for the release was paid by a third person under no legal or moral obligation to discharge the debt, and in consequence of an agreement that such payment should constitute a complete satisfaction. *Clark v. Abbott*, 577.

2. **PAYMENT, RETURN AND RESCISSION OF, WHEN ESSENTIAL TO CAUSE OF ACTION.**—If a person injured receives payment for part of the injury, and a receipt is procured from him by fraud purporting to release his whole cause of action, he is not obliged to return the money thus paid to him before maintaining an action to recover for the residue of his injuries for which no compensation has been made. *Bliss v. New York etc. R. R. Co.*, 504.
3. **RELEASE OF PART OF DAMAGES SUSTAINED BY AN INJURY.**—If a person by the same accident is injured in his person and also in his clothing, and accepts payment for his clothing, it does not release that part of his cause of action founded upon his personal injuries. *Bliss v. New York etc. R. R. Co.*, 504.

See FRAUD.

REMOVAL.

See OFFICERS, 11-16.

RENTS.

See COTENANCY, 10; PARTITION, 3.

REPLICATION.

See PLEADING, 9.

RESCISSION.

See CONTRACTS, 5, 8-10, 11.

RES JUDICATA.

See ADOPTION, 11; MARRIAGE AND DIVORCE, 1-5.

RESTRAINT OF TRADE.

See CONTRACTS, 9; MONOPOLIES, 1.

REVERSION.

See LANDLORD AND TENANT, 5, 6; PLEADING, 10.

RIGHT OF WAY.

See NUISANCE, 1.

SALES.

1. **A SALE** Is a transfer of the absolute or general property in a thing for a price in money. *Foley v. Felrath*, 39.
2. **LOSS OF GOODS ON WHOM MUST FALL.**—If a sale is complete, and the goods perish without the fault of the seller, the purchaser is bound to pay the purchase price. *Foley v. Felrath*, 39.
3. **QUESTION FOR JURY.**—When a contract of sale is in writing, its construction is for the court and not for the jury to determine. *Foley v. Felrath*, 39.

4. A SALE IS NOT COMPLETE, but remains executory, if any thing is yet to be done by either party before delivery, as, for example, to determine the price, quantity, or identity of the thing sold. *Foley v. Felrath*, 39.
5. CONTRACT—TIME OF PAYMENT, WHEN AN ESSENTIAL PART OF.—Under a contract for the sale and purchase of oyster-shells made by the vendor during a designated season, in which the vendee agrees to pay on the first day of each and every successive week for the shells delivered during the previous week, such weekly payments constitute an essential part of the contract, and the failure to make them entitles the vendor to rescind the contract. *McGrath v. Gegner*, 415.
6. SALES—IMPLIED WARRANTY THAT ANIMAL IS NOT IMPOTENT.—If on the sale of a bull both parties are alike destitute of knowledge or the means of forming an intelligent judgment whether he is able or not to generate his kind, and there is no misrepresentation or fraud, and no express warranty, no warranty is implied in that respect merely because a full price is paid for the animal for breeding purposes, and the seller knows that he is being purchased for that purpose. *McQuaid v. Ross*, 864.
7. BREACH OF WARRANTY—OFFER TO RETURN.—If the capacity of machinery warranted by the seller is unknown to the purchaser at the time of the sale, and such purchaser buys, relying upon the warranty, he is not precluded from recovering his legitimate damages for a breach of such warranty, although he fails to return, or offer to return, the machinery upon discovery of its want of capacity, and fails to notify the seller thereof. *Larson v. Aultman etc. Co.*, 893.
8. UPON A SALE IN WHICH THE VENDEE RETAINS THE RIGHT TO REJECT OR RETURN the goods sold, the title passes subject to being divested by the exercise of the option to rescind, expressed within a reasonable time. *Foley v. Felrath*, 39.
9. AN OPTION TO RETURN GOODS PURCHASED if the vendee should not like them is very different from an option to purchase them if he should like them. In the first case they are his property until he exercises his option, and in the second they are not his property until after the option has been exercised. *Foley v. Felrath*, 39.
10. SALE WITH PRIVILEGE TO RETURN.—The loss of property which has been purchased with the privilege of returning it and rescinding the sale must be borne by the purchaser, and the sale considered as absolute if such loss occurs before the option has been exercised. *Foley v. Felrath*, 39.
11. DEFECTS IN MACHINERY—CONFLICT IN EVIDENCE.—In an action to recover for defects in machinery purchased, it is error to charge the jury that the purchaser having purchased with full opportunity for inspection cannot recover, especially when the evidence is conflicting as to whether the defects were patent or not. *Larson v. Aultman etc. Co.*, 893.
12. WARRANTY BY AGENT.—A purchaser of machinery may recover from the seller for a breach of warranty by the agent of the latter, upon proof of a general custom amongst agents selling such machinery to warrant it. *Larson v. Aultman etc. Co.*, 893.

See CROPS; DAMAGES; EXECUTION, 1-5; EXECUTORS AND ADMINISTRATORS; INTERSTATE COMMERCE; MONOPOLIES; PLEDGE, 4; TAXES, 1.

SEAL

See CORPORATIONS, 4; DEEDS, 5; MANDAMUS, 4.

SETOFF.

1. HOW CONSTRUED.—SETOFF is a statutory right in derogation of the common law, and must be strictly construed. *Bradley v. Smith*, 565.
2. WHAT NOT SUBJECT OF.—In an action by an assignee against a creditor of the assignor to recover on a claim or chose in action not due at the time the assignment was made the creditor cannot set off a claim against such assignor which was mature before that time. *Bradley v. Smith*, 565.
3. ASSIGNMENT OF CLAIM.—One who buys or takes an assignment of a claim against another, not negotiable, takes it subject to such rights of setoff only as are due at the time of the transfer. *Bradley v. Smith*, 565.
4. A SETOFF IS ENFORCEABLE AGAINST AN ASSIGNOR FOR THE BENEFIT OF CREDITORS, if it is a demand which became due from the assignor at or before the making of the assignment. *Laybourn v. Seymour*, 579.
5. A SETOFF IS ALLOWABLE IN EQUITY AFTER THE INSOLVENCY of the person from whom the demand is due, though it is not within the statutes respecting the allowance of setoffs. *Laybourn v. Seymour*, 579.
6. SETOFF—STATUTE OF LIMITATIONS.—The life of a setoff is equal to that of the original claim, and is only barred when the original claim is barred. *Peden v. Cavins*, 276.

See NEGOTIABLE INSTRUMENTS, 1.

SHERIFF'S DEEDS.

See ADVERSE POSSESSION, 8; EXECUTION, 1, 2, 4.

SLANDER.

See LIBEL.

SPECIFIC PERFORMANCE.

1. IF A CONTRACT IMPLIES THE PERFORMANCE OF PERSONAL SERVICES requiring special skill, judgment, and discretion, a court of equity will not undertake its specific performance. *South etc. Alabama R. R. Co. v. Highland Ave. etc. R. R. Co.*, 74.
2. MUTUALITY, WANT OF.—Though a contract is not binding upon one of the parties when it is executed, yet, if it gives him an option to accept its terms, he may, by suit or otherwise, waive the want of mutuality, and enforce specific performance of the contract. Therefore, if one railway corporation agrees that another may construct its tracks across the right of way of the former, upon specified conditions, the contract will not be refused specific performance for want of mutuality if the corporation has accepted, or sought to accept, the contract in its favor, and to compel the other corporation to submit to the construction of the tracks as agreed upon. *South etc. Alabama R. R. Co. v. Highland Ave. etc. R. R. Co.*, 74.
3. CONTRACT FOR PERSONAL SERVICES.—If railway corporation A agrees with railway corporation B that the former will permit the latter to construct and operate tracks upon the former's right of way, and to make certain crossings which the exercise of the privilege may render necessary, and in return B agrees that A may cross certain property belonging to B whenever and wherever it may elect to exercise that privilege, and to maintain proper crossings, and that on the failure to renew

or repair such crossings, after thirty days' notice, that they may be renewed or repaired at its expense by the other corporation, there is not, on the part of either, such a contract for personal services as will induce a court of equity to refuse specific performance of the contract. The refusal to repair or renew the crossings as provided for in the contract would create a mere pecuniary liability. *South etc. Alabama R. R. Co. v. Highland Ave. etc. R. R. Co.*, 74.

4. **PAROL CONTRACT CONCERNING HOMESTEAD.**—A parol contract that a son who is the grantee in a deed of a homestead conveyed by his father alone shall support his parents during their life, and at their death become the owner of the land in fee, if fully performed by such grantee, may be specifically enforced by him against the heirs at law of the grantor. *Whitmore v. Hay*, 838.
5. **HOMESTEAD—SPECIFIC PERFORMANCE OF PAROL CONTRACT.**—Though a deed of a homestead made by a father alone to his son is void, as a conveyance, yet if it is made in pursuance of a parol contract between the grantee and his parents, that they are to convey it to him in consideration of his supporting them during their lives, he is entitled to specific performance of the contract after their death, upon full performance on his part, and he is also entitled to have the deed reformed, so as to vest the whole title in him, as against the heirs of the grantor. *Whitmore v. Hay*, 838.
6. **INADEQUACY OF CONSIDERATION AS A DEFENSE.**—Mere inadequacy of consideration or value is not in itself a sufficient reason to refuse to specifically enforce a contract. Whether the bargains of persons competent to deal with their own affairs are wise or unwise are considerations not for courts of justice but for the parties themselves to deliberate upon. *South etc. Alabama R. R. Co. v. Highland Ave. etc. R. R. Co.*, 74.
7. **NOTWITHSTANDING AN ACTION AT LAW COULD BE MAINTAINED TO RECOVER DAMAGES** for the refusal of one railway corporation to permit another to cross its tracks, according to the terms of an agreement between them, a court of equity will compel specific performance of the agreement, and will enjoin the defendant from preventing the use of its tracks in the manner specified in the agreement. *South etc. Alabama R. R. Co. v. Highland Ave. etc. R. R. Co.*, 74.

STATES.

See **ADVERSE POSSESSION**, 11; **CONFLICT OF LAWS**; **FISHERIES**, 3; **INTERSTATE COMMERCE**; **JUDGMENTS**, 7, 8; **TAXES**, 5.

STATIONS.

See **RAILROADS**, 20-22.

STATUTE OF FRAUDS.

See **CORPORATIONS**, 2.

STATUTE OF LIMITATIONS.

See **LIMITATIONS OF ACTIONS**.

STATUTES.

1. **STATUTORY CONSTRUCTION.**—If a statute of a state has been construed by its highest judicial tribunal, such construction will ordinarily be received as conclusive in the courts of other states. *Van Matre v. Sankey*, 196.

- 2. CONSTRUCTION OF RAILROAD FENCE STATUTE.**—In a statute requiring notice of claim of the killing of stock by a railroad company to be given "to any general agent or officer of such corporation or person, or to any station, depot, or other agent or officer acting for such corporation, in the county where such livestock was killed or injured," the words subsequent to the word "officer," where it appears the second time, do not qualify any of the preceding words, except those after the word "person." *Jacksonville etc. Ry. Co. v. Harris*, 127.
- 3. CONSTITUTIONAL LAW—AMENDMENT OF STATUTE—CHANGE OF REMEDY.** When a statute provides that the personal representative of a person killed by the wrongful act of another may maintain an action therefor, for the exclusive benefit of the widow and children, or the next of kin of the deceased, and a subsequent supplementary act merely provides how that action may be enforced for the benefit of the family of a person so killed, when the residence of the deceased person, at the time of his death, is in another state, or when no personal representative has been appointed, such supplementary act does not create a new cause of action, but is simply a change of remedy; nor is it in conflict with a constitutional provision providing that "no law shall be revised or amended, unless the new act contains the entire act revised, or the section or sections amended, and the section or sections amended shall be appealed." *Berry v. Kansas City etc. R. Co.*, 371.
- See** **ADOPTION**, 5, 8, 17; **EXECUTION**, 8; **INTERSTATE COMMERCE**, 6, 7; **FISH-ERIES**, 3; **LIENS**, 1; **PLEADING**, 7; **SETOFF**, 1; **SURVEYS**, 4; **TAXES**, 2.

STOCKS.

See **CORPORATIONS**, 1-3; **PLEDGE**, 1, 2; **TROVER**.

STOPOVER.

See **RAILROADS**, 13.

STREET ASSESSMENTS.

See **MUNICIPAL CORPORATIONS**, 14-15.

STREET RAILROADS.

See **RAILROADS**, 32.

STREETS.

See **DEDICATION**; **INJUNCTIONS**; **MUNICIPAL CORPORATIONS**, 19; **NEGLECT**, 3-5; **RAILROADS**, 29-31.

SUBROGATION.

SUBROGATION AND EQUITABLE ASSIGNMENT.—If money is loaned to a husband and wife under an agreement that it is to be used to discharge a mortgage existing against her real property, and that a mortgage is to be given to the lender for the amount so loaned, and the money is afterwards advanced as agreed, and is applied to the satisfaction of the mortgage, after which the borrowers refuse to execute a mortgage to the lender, he is an equitable assignee of the mortgage so satisfied, and entitled to be subrogated to the lien thereof. *Baker v. Baker*, 776.

See **INSURANCE**, 20.

SUPPLEMENTAL BILL.

See PLEADING, 5.

SURETYSHIP.

See OFFICERS, 8-10.

SURFACE WATERS.

See RAILROADS, 3-7; WATERS.

SURVEYS.

1. **LOCATION OF PUBLIC LANDS.**—Testimony as to lines of trees set so as to correspond to the location of a corner, at a place where one of the parties to the suit claims such corner to be, and also to the building of a schoolhouse on a lot which ran down to such corner, is admissible as tending to show the understanding of different parties in the vicinity as to the location of the corner, and aiding the jury in solving the question whether a certain mound, pit, or stake testified to by a witness did or did not constitute a government corner. *Arneson v. Spawen*, 783.
2. **PUBLIC LANDS.**—A DEFINITELY ASCERTAINED MONUMENT fixed by government surveyors as a boundary or corner between sections of land must govern as against other surveys or evidence tending to prove that such monuments or corners should have been located elsewhere. *Arneson v. Spawen*, 783.
3. **PUBLIC LANDS.**—If a survey of public lands has been made by the government, and a patent issued to land covered by it described with reference to such survey, and it appears that a corner was established by the government surveyors, it must be accepted as the true corner, without regard to whether or not it was located with mathematical exactness. *Arneson v. Spawen*, 783.
4. **EVIDENCE—OFFICIAL SURVEYS.**—Though the statute declares that the report of an official survey certified in a particular manner shall be presumptive evidence of the facts stated therein, yet if the report is not received in evidence, but the surveyor himself testifies as a witness to the fact of his survey, and what was disclosed thereby, the probative value of his testimony is not fixed by law, and it must, therefore, be submitted to the jury like any other evidence. *Arneson v. Spawen*, 783.

See BOUNDARIES.

TAXES.

1. **TAX SALES, LAW GOVERNING—RETROACTIVE STATUTE.**—The sale of land for delinquent taxes constitutes a contract between the purchaser and the state, the terms of which are to be found in the law then in force, and a subsequent statute reducing the rate of interest on the tax certificate, or extending the time of redemption, does not apply to prior sales. *Pounds v. Rodgers*, 360.
2. **TAX SALES, LAW GOVERNING.**—All matters relative to the sale and conveyance of land for taxes under any prior statute must be completed according to the laws under which they originated, the same as if such laws remained in force, irrespective of any subsequent statute on the subject. *Pounds v. Rodgers*, 360.
3. **TAX SALES AND DEEDS.**—NOTICE OF AN INTENDED APPLICATION FOR A TAX DEED must, under the statutes of Illinois, be served on the owner

of the property personally, if he can by diligent inquiry be found in the county. *Van Matre v. Sankey*, 196.

4. A TAX DEED must be based upon an affidavit showing a strict compliance with the conditions upon which it is authorized to be issued, and if the affidavit merely states that the affiant, prior to the expiration of the time for redemption, made diligent search and inquiry, and was unable to find the owner in the county, and made such diligent search and inquiry in that county, this is not equivalent to an affidavit showing that the owner cannot, by diligent inquiry, be found in the county, and the deed based upon such inquiry is void. *Van Matre v. Sankey*, 196.
5. CONSTITUTIONAL LAW—TAXATION OF OCCUPATIONS.—A state cannot tax a business occupation when it cannot tax the business itself, and a tax on the occupation of doing a business is a tax on the business. *Osborne v. State*, 99.

See INTERSTATE COMMERCE, 2-7; ADVERSE POSSESSION, 3.

TAXING COSTS.

See JUDGMENTS, 1.

TAX SALES.

See COTENANCY, 6-8.

TENDER.

- A TENDER MADE IN A CHECK is good if objected to upon an entirely different and untenable ground. *McGrath v. Gegner*, 415.

See CORPORATIONS, 3.

TENANTS IN COMMON.

See COTENANCY.

THREATS.

See DURESS.

TICKETS.

See CARRIERS 1, 3; RAILROADS, 13, 14.

TORTS.

See CORPORATIONS, 5.

TOWNSHIPS.

See OFFICERS, 8.

TRADES UNIONS.

See LABOR UNIONS.

TREASURER.

See OFFICERS, 8.

TRESPASS.

TRESPASS QUARE CLAUSUM FREGIT cannot be sustained by the owner of property, not in possession nor entitled to the possession thereof at the time of the alleged trespass. *Arneson v. Spawen*, 783.

TRESPASSERS.

See ADVERSE POSSESSION, 10.

TRIAL.

1. **WHEN PROPERLY REFUSED.**—If several issues are joined in a case, some triable by jury and some by the court, a demand for a jury to try all of the issues is properly refused. *Peden v. Cavins*, 276.
2. **CONSTITUTIONAL LAW—RIGHT TO TRIAL BY IMPARTIAL JURY.**—A person accused of crime, who is compelled to be tried on his plea of not guilty before the same jury that has heard and considered the evidence on his special plea of insanity, and has disagreed, and been discharged from further consideration of such special plea, is thereby deprived of his constitutional right to trial by an impartial jury. *French v. State*, 855.
3. **JURORS—QUALIFICATIONS OF.**—Jurymen who have disagreed as to the insanity of a person accused of crime, when such issue was submitted to them, are disqualified from sitting on a jury to try the accused under his plea of not guilty. *French v. State*, 855.
4. **AN INSTRUCTION TO A JURY MAY PROPERLY BE REFUSED** if based upon an assumption of fact, and applicable only upon the jury finding the fact in the manner assumed. *Arneson v. Spawen*, 783.
5. **MISCONDUCT OF JURY** may be proved on a motion for a new trial by the testimony of a deputy sheriff, in whose charge they were, as to what he heard said by the jury in the jury-room tending to show that the cause was decided by lot or by the drawing of ballots from a hat in which ballots had been put, some marked for the plaintiff and some for the defendant. *Wright v. Abbott*, 499.
6. **PRACTICE.**—A GENERAL OBJECTION TO EVIDENCE is properly overruled if a part of it is admissible, though another part is not. *Cofor v. Scroggins*, 52.
7. **THE TIME FOR ARGUMENT BEFORE THE JURY MAY BE LIMITED BY THE COURT.** *Monmouth Mining etc. Co. v. Erling*, 187.
8. **PRACTICE—FINDINGS INCONSISTENT WITH VERDICT.**—When special findings of fact are inconsistent with the general verdict rendered the former controls the latter, and the court may give judgment accordingly. *Kansas City v. Brady*, 349.
9. **FINDINGS OF FACT** by the court, if within the issues presented by the pleadings and supported by the evidence, cannot be contrary to law. *Ashmead v. Reynolds*, 238.
10. **VERDICT FINDING DEFENDANT GUILTY AS CHARGED** is, in effect, a finding that he is guilty of every matter alleged against him in the indictment. *In re Black*, 331.
11. **CRIMINAL LAW—RIGHT OF ACCUSED TO BE PRESENT.**—PRESUMPTION is not indulged that a person accused of crime was present during his trial and sentence, if the record fails to show it. *French v. State*, 855.
12. **CRIMINAL LAW—RIGHT OF ACCUSED TO BE PRESENT ON HIS TRIAL.**—The failure of the record to show that a person accused of crime was present in court when the verdict of guilty was rendered against him, or that he was present when sentence was pronounced against him, or immediately before, or that he was asked by the court if he had any thing to say why he should not be sentenced, is fatal to the verdict and judgment thereon. *French v. State*, 855.

See APPEAL; PARDONS, 3.

TROVER.

1. **STOCK—CONVERSION—MEASURE OF DAMAGES.**—The true measure of damages for a conversion of stock and bonds is their highest intermediate market value between the time of the conversion and a reasonable time after notice thereof within which to replace them, and not their highest value between the time of the conversion and the time of trial. *Dimock v. United States Nat. Bank*, 643.
2. **STOCKS—CONVERSION—MEASURE OF DAMAGES.**—The rule that the measure of damages for the conversion of property is its market value at the time of the conversion does not apply to the conversion of stocks and bonds or other commercial securities, the market value of which is liable to great fluctuations in a short time. *Dimock v. United States Nat. Bank*, 643.

TRUSTS.

1. **HUSBAND AND WIFE—RESULTING TRUST—LIMITATIONS.**—A resulting trust in favor of a wife arising from her husband's purchasing land with her money, and taking the title in his name without her knowledge, is not barred by the statute of limitations in favor of his heirs who have no equities superior to his when he, while living, always confessed the trust and never had, or claimed, any adverse possession to the land. *Fawcett v. Fawcett*, 844.
 2. **IMPLIED OR RESULTING TRUSTS ARISE** when land is purchased in the name of one person with the money of another; or when a purchase of land is made by a trustee, in his own name, with trust money; or when such purchase is made by a partner in his own name with partnership funds; or when a conveyance has been obtained by fraud, or in similar cases. *Tanney v. Tanney*, 678.
 3. **FOLLOWING TRUST FUNDS.**—Whether a disposition of trust funds be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, if he can identify them. If they cannot be identified, because they are mingled with the moneys of the trustee, then the beneficiary is entitled to a charge upon the new investment to the extent of the trust money traceable in it. *Springfield Institution v. Copeland*, 489.
- See **CONTRACTS**, 6; **COTENANCY**, 8; **EXECUTORS AND ADMINISTRATORS**; **HUSBAND AND WIFE**, 6; **LIMITATIONS OF ACTIONS**, 2, 3; **MONOPOLIES**, 1.

ULTRA VIRES.

See **CORPORATIONS**, 5, 6.

UNDUE INFLUENCE.

See **WILLS**, 2, 3.

UNIONS.

See **LABOR UNIONS**.

VARIANCE.

See **JUDGMENTS**, 17; **PARTITION**, 10.

VERDICT.

See **APPEAL**, 7; **NEGLIGENCE**, 10; **TRIAL**, 8.

WAGES.

See CONSPIRACY, 3-5.

WAGERS.

See INSURANCE, 31.

WAIVER.

See INFANTS, 3; INSURANCE, 14-18; JUDGMENTS, 17.

WAREHOUSEMEN.

See ATTACHMENT, 3.

WARRANTY.

See SALES, 6-12.

WASTE.

IF WASTE IS COMMITTED BY THE ALIENEE OF THE PROPERTY IN THE HUSBAND'S LIFETIME the widow has no remedy; it is otherwise for waste committed after the husband's death. *Sanders v. McMillan*, 19.

WATER COMPANIES.

See CONTRACTS, 3.

WATERS.

1. **SURFACE WATERS.**—If an owner improves his land for the purpose for which it is ordinarily used, doing only what is necessary for that purpose, and being guilty of no negligence in the manner of doing it, he is not liable because, as an incident of so improving, the surface waters accumulate, and flow in a stream upon the land of another. *Brown v. Winona etc. Ry. Co.*, 603.
2. **SURFACE WATER.**—One landowner has the right to use and improve his own land for the purposes for which similar land is ordinarily used. He may raise or lower its surface, even though the effect may be to prevent surface water, which before flowed upon it, from going upon it, or to draw from adjoining land surface water which would otherwise remain there, or to shed surface water over land on which it would not otherwise go. *Missouri Pac. Ry. Co. v. Renfro*, 244.

See MUNICIPAL CORPORATIONS, 12.

WILLS.

1. **TESTAMENTARY CAPACITY**—TEST OF.—To establish testamentary capacity, it is only necessary that the testator had sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who are, should, or may be the objects of his bounty, and the scope and bearing of his will. He must have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and to be able to form some rational judgment concerning them. *McMaster v. Scriven*, 828.

2. **UNDUE INFLUENCE—BURDEN OF PROOF—PRESUMPTION.**—Undue influence in the execution of a will is never presumed. The burden of proof to show it is generally upon the contestant. *McMaster v. Scriven*, 828.
3. **UNDUE INFLUENCE—BURDEN OF PROOF—PRESUMPTION.**—The fact that a childless widow bequeathes one-half of her estate to a nephew and niece, who resided with and cared for her during her last illness, while the remainder of her estate is divided among a large number of legatees, does not impose upon such nephew and niece the burden to prove the absence of fraud or undue influence, nor does their opportunity to exercise undue influence, coupled with the liberal provision in their favor, raise a presumption that the will was the result of such influence, especially when it is not shown that the provisions of the will were not the free, uninfluenced result of the deliberate and intelligent judgment of the testatrix. *McMaster v. Scriven*, 828.
4. **A WITNESS TO A WILL NEED NOT BE INFORMED OF ITS CONTENTS—WILLS DRAWN BY BENEFICIARY.**—It is not necessary to prove that a will was read over or explained to the testator at the time it was executed if he could both read and write. Even when the will is drawn by one who is a beneficiary thereunder, it will be sustained if there is legal evidence satisfying the court that it expresses the spontaneous intention of the testator, though there is no direct proof that it was read or explained to him at the time of its execution. *Garrett v. Heflin*, 89.
5. **A WITNESS MAY ATTEST A WILL BY HIS MARK** where the testator signs his own name. *Garrett v. Heflin*, 89.

See ATTORNEY AND CLIENT, 1.

WITNESSES.

1. **RAILROADS—NEGLIGENCE—EVIDENCE.**—In an action to recover damages for an injury caused by falling through an open trestle alleged to have been left unguarded in a grossly negligent manner by a railroad company, the engineer who built the trestle is competent to testify as to the time, manner, and purpose of its construction, as well as that of surrounding structures. *Johns v. Charlotte etc. R. R. Co.*, 709.
2. **EVIDENCE—EXPERT AS TO CONDITION OF MIND.**—A physician who has heard a detailed statement of injuries received in a railway accident may be permitted to testify as to their probable or possible effect on the mental faculties of the person injured, when he, on his part, claims that a receipt executed by him soon afterwards was executed while he was in a rattled or dazed condition, and others testify that he was in his usual condition, and apparently not suffering from any undue excitement or any impairment of his mental faculties. *Bliss v. New York etc. R. R. Co.*, 504.
3. **EVIDENCE—EXPERT.**—IT IS PROPER TO ALLOW A PHYSICIAN to testify whether or not certain injuries sustained by plaintiff were, in his opinion, sufficient to produce her miscarriage, and to give the reasons why this result might follow. *Benjamin v. Holyoke etc. Ry. Co.*, 446.
4. **EJECTMENT—ADVERSE POSSESSION—OPINION EVIDENCE.**—A party to an action of ejectment cannot testify that he has been in open, notorious, and actual possession of the disputed land. Such evidence calls for the

mere opinion of the witness on a material issue of fact, which it is the province of the jury to decide under proper instructions from the court.
Watrous v. Morrison, 139.

See ATTORNEY AND CLIENT; EJECTMENT; WILLS, 4, 5.

WORDS AND PHRASES.

See DEFINITIONS.





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